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IN THE
Supreme Court of the United States
October Term, 1995

Estate of Diane Montag, by and through Michael Montag,
the Personal Representative of the Estate, and
Michael Montag, individually,
Petitioners,

v.

American Honda Motor Company, Inc.,
Honda Motor Company, Ltd., a Japanese corporation, and
Honda R & D Co., Ltd., a Japanese corporation,
Respondents.

Petition for a Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the United States Court of Appeals for the Tenth Circuit err by holding—in direct conflict with several other federal circuits and state courts of last resort—that Honda's compliance with a Federal motor vehicle safety standard effectively exempted Honda from liability at common law, even though the National Traffic and Motor Vehicle Safety Act of 1966 expressly provides that "[c]ompliance with any Federal motor vehicle safety standard . . . does not exempt any person from any liability under common law."

PARTIES TO THE PROCEEDING

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No. 95-____

IN THE
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Estate of Diane Montag, by and through Michael Montag,
the Personal Representative of the Estate, and
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American Honda Motor Company, Inc.,
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Respondents.

Petition for a Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

The Estate of Diane Montag, and Michael Montag, respectfully petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit in this case is reported as *The Estate of Diane Montag v. American Honda Motor Company, Inc.*, 75 F.3d 1414 (10th Cir. 1996), and reprinted in the Appendix hereto at 10a - 26a. The ruling of the trial court with regard to the preemption issues is reported as *The Estate of Diane Montag v. Honda Motor Company, Ltd.*, 856 F.Supp. 574 (D. Colo. 1994), and reprinted in the Appendix hereto at 1a - 9a.

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit on the issues presented by this Petition was entered on January 22, 1996. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

15 U.S.C. § 1392(d)[1] provides:

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[1]The National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. §§ 1381, *et seq.*, along with other statutes governing transportation, were recently recodified "without substantive change." Pub. L. No. 103-272, § 1(a), 108 Stat. 745 (1994). As a result, what was 15 U.S.C. § 1392(d) is now 49 U.S.C. § 30103(b). All of the applicable preemption cases, including the decisions of the two courts below, discuss the provisions as codified before the 1994 recodification. For convenience, this Petition uses the citations employed in those decisions.

(d) Supremacy of Federal Standards: allowable higher standards for vehicles used by Federal or State governments.

Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard. Nothing in this section shall be construed as preventing any State from enforcing any safety standard which is identical to a Federal safety standard. Nothing in this section shall be construed to prevent the Federal government or the government of any State or political subdivision thereof from establishing a safety requirement applicable to motor vehicles or motor vehicle equipment procured for its own use if such requirement imposes a higher standard of performance than that required to comply with the otherwise applicable Federal standard.

15 U.S.C. § 1397(b)[2] provides:

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[2]Now 49 U.S.C. § 30103(e).

(k) Continuation of common law liability.

Compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law.

STATEMENT OF THE CASE

On June 22, 1990, at approximately 8:15 a.m., a train traveling approximately 30 miles per hour hit the left rear wheel of the 1988 Honda Prelude that Diane Montag was driving. The force of the crash prompted the car's door to pop open and, since the car's safety belt was attached to the door, it simply released Mrs. Montag. She was ejected from the car and sustained injuries which ultimately resulted in her death.

Petitioners then filed this lawsuit for damages in the Federal Court for the District of Colorado against the Respondents (collectively "Honda"), on theories of strict product liability and negligence. The Complaint alleged that, but for Honda's negligence and/or defective design, Diane Montag would not have been ejected from the vehicle and would not have sustained the injuries which ultimately led to her death.

During the course of discovery, Honda produced various internal documents and engineering studies related to its efforts to select a passive restraint system to meet the minimum requirements of Federal motor vehicle safety standard 208. Standard 208 required certain crash performance requirements be met without action being required on the part

of the driver or passenger of the vehicle. These requirements could be met by means of padding, airbags, and/or "automatic seatbelts."

The documents produced by Honda compared and contrasted various alternatives and showed that, although Honda believed that the safest and most effective system was a manual 3-point *body-mounted* safety belt with an airbag, it settled on the least expensive system: a 3-point *door mounted* safety belt system without an airbag. As this accident demonstrates, a 3-point door mounted system will not keep the driver in place if the door opens during a crash.

These documents were authored by Kazou Higuchi (one of two Deputy Large Project Leaders of Honda's project to select passive restraints to meet Standard 208) and Noboru Hashimoto (Member of the Board of Directors of Honda R&D, Ltd., and the Large Project Leader of the Honda project to select passive restraints to meet Standard 208). When those individuals' videotaped depositions were taken, both witnesses acknowledged that, according to the documents they had authored, the safest, most effective, and best passive restraint system consisted of a manual 3-point safety belt, connected directly to the body of the car, and an airbag.

Honda had previously allowed the district court's deadline for filing motions raising the defense of Federal preemption to pass. It did not, however, want the jury to consider this damaging evidence. It, therefore, filed a motion in limine seeking to bar the introduction of the above-referenced documents and testimony. Honda argued that, since

"no-airbag" claims were preempted, the Montags should be precluded on preemption grounds from introducing any evidence referring to airbags.

The district court granted Honda's motion and precluded Petitioners from offering evidence of the safer and economically feasible alternative design that Honda had considered—the airbag and manual body-mounted belt combination. This meant that the documents produced by Honda and video testimony of Honda's in-house engineers had to be edited to eliminate any reference to airbags. For instance, the jury did not hear Mr. Hashimoto's testimony that Honda's documents stated that: ". . . the ideal system is [an] airbag plus the 3-point belt." However, the jury did hear Mr. Hashimoto's testimony that the vehicles equipped with door mounted automatic belt system were "perfect products."

The Montags did not contend that an airbag would have made a difference in this crash. The district court's preemption ruling, however, effectively precluded the Montags from proving their case. Under Colorado law, it was the Montags' burden to prove there were safer, economical alternatives to the automatic safety belt system selected and designed by Honda, but the court's ruling prevented the Montags from mentioning the safest, most effective alternative Honda had considered—the 3-point body-mounted seatbelt with an airbag.

Moreover, since a system containing an airbag is the only system with a body-mounted 3-point seatbelt that Federal motor vehicle safety standard 208 identifies as an acceptable passive restraint system, the district court's order left Honda

free to falsely inform the jury—without fear of contradiction—that the system it chose was the safest passive restraint system that complied with Federal law. Thus, beginning with its opening statement, and extending into the testimony of its experts and in-house engineers, Honda repeatedly misinformed the jury that the system in Mrs. Montag's car was "the best" and/or "the safest" system available to meet the requirements of FMVSS 208. Honda made these misrepresentations knowing full well that the trial court's ruling on the motion in limine prevented the Montags from revealing the truth.

The jury specifically found that Mrs. Montag's injuries were caused by her ejection from her vehicle. Given the court's limitation of evidence of alternative systems permitted and given the jury instructions regarding Colorado's presumption of non-negligence and non-defectiveness where Federal standards have been met, the jury inevitably concluded that the door mounted safety belt was not defectively designed (presumably because it met FMVSS 208) and that Honda was not negligent in designing the door mounted safety belt system.

Petitioners appealed to the United States Court of Appeals for the Tenth Circuit. The Tenth Circuit did not analyze the effects of the holdings of *Cipollone v. Liggett Group, Inc.*, 789 F.2d 181 (3d. Cir. 1986), *rev'd in part and aff'd in part*, 112 S. Ct. 2608 (1992); and *Freightliner Corp. v. Myrick*, 115 S. Ct. 1483 (1995), on its previous decision in *Kitts v. General Motors Corp.*, 875 F.2d 787 (10th Cir. 1989), *cert. denied* 494 U.S. 1065 (1990). Nor did it mention the recent decisions of the New Hampshire Supreme Court and the

Supreme Court of Indiana rejecting both express and implied preemption of "no-airbag" claims. *Ford Motor Co. v. Tebbetts*, 165 A.2d 345 (N.H. 1995), *cert. denied* 116 S. Ct. 773, *rehrg. denied* 116 S. Ct. 1036 (1996); and *Wilson v. Pleasant and General Motors Corp.*, 660 N.E.2d 327 (Ind. 1995). It simply held that *Kitts* remained good law and that an implied preemption analysis excluded airbag evidence.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW DIRECTLY CONFLICTS WITH THE DECISIONS OF NUMEROUS FEDERAL CIRCUITS AND STATE COURTS OF LAST RESORT, WHICH HOLD THAT COMPLIANCE WITH MOTOR VEHICLE SAFETY STANDARDS DOES NOT EXEMPT THE MANUFACTURER FROM LIABILITY UNDER COMMON LAW.

The decision below should be reviewed because it directly conflicts with the decisions of numerous Federal circuits and state courts of last resort, presenting an issue that Honda and its fellow auto manufacturers have already urged this Court to hear. A brief review of the cases interpreting the Safety Act's preemptive effect demonstrates the aberrant nature of the Tenth Circuit's decision.

The Safety Act was enacted in 1966. For the next twenty years, eight Federal appeals courts and five state courts of last resort addressed the issue of whether compliance with Federal motor vehicle safety standards exempts automobile

manufacturers from liability in design cases. They each reached the same conclusion: Congress' words mean what they say:

> [c]ompliance with any Federal motor vehicle safety standard . . . does not exempt any person from any liability under common law.

15 U.S.C. § 1397(k).[3]

In 1986, however, the Third Circuit issued its since rejected decision in *Cipollone v. Liggett Group, Inc.*, *supra.*, expanding the implied preemption doctrine to find certain common law claims involving cigarettes preempted despite Congress' intent to the contrary. Within a year, the First and Eleventh Circuits issued similar decisions. *Palmer v. Liggett Group, Inc.*, 825 F.2d 620 (1st Cir. 1987); *Stephen v. American Brands, Inc.*, 825 F.2d 312 (11th Cir. 1987).

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[3]*See Knippen v. Ford Motor Co.*, 546 F.2d 993, 1000 (D.C. Cir. 1976); *Dawson v. Chrysler Corp.*, 630 F.2d 950, 957-58 (3d Cir. 1980), *cert. denied*, 450 U.S. 959 (1981); *Stonehocker v. General Motors Corp.*, 587 F.2d 151, 156-57 (4th Cir. 1978); *Dorsey v. Honda Motor Co. Ltd.*, 655 F.2d 650, 656-57 (5th Cir. 1981), *cert. denied*, 459 U.S. 880 (1982); *Shipp v. General Motors Corp.*, 750 F.2d 418, 421 (5th Cir. 1985); *Sours v. General Motors Corp.*, 717 F.2d 1511, 1516-17 (6th Cir. 1983); *Schwartz v. American Honda Motor Co., Inc.*, 710 F.2d 378, 383 (7th Cir. 1983); *Larsen v. General Motors Corp.*, 391 F.2d 495, 506 (8th Cir. 1968); *Fox v. Ford Motor Co.*, 575 F.2d 774, 778 (10th Cir. 1978); *General Motors Corp. v. Edwards*, 482 So.2d 1176, 1198 (Ala. 1985); *Volkswagen of America, Inc. v. Young*, 272 Md. 201, 321 A.2d 737, 746 (Md. App. 1974); *H.P. Hood & Sons, Inc. v. Ford Motor Co.*, 370 Mass. 69, 345 N.E.2d 683, 688 (1976); *Arbet v. Gussarson*, 66 Wis.2d 551, 225 N.W.2d 431, 438 (1976).

Before this Court had an opportunity to overturn these decisions, the erroneous implied preemption analysis adopted in the cigarette cases was applied by Federal appeals courts to the interpretation of the Safety Act. In 1988, the First Circuit heard *Wood v. General Motors Corp.*, 865 F.2d 395 (1st Cir. 1988). The First Circuit explicitly adopted the rationale of *Palmer*, its recent cigarette labeling decision, and became the first appeals court in the nation to find a common law claim of automobile products liability impliedly preempted by the Safety Act despite Congress' clear statement of anti-preemptive intent. *Wood*, *supra.* at 410-11. In the next three years, the Third, Tenth, and Eleventh Circuits (and several lower courts) followed, issuing other implied preemption decisions, including *Kitts v. General Motors Corp.*, *supra.*

In 1992, this Court issued its decision in *Cipollone* explicitly rejecting the Third Circuit's expansion of the implied preemption doctrine. In a portion of the opinion, joined by seven members, this Court said:

> In our opinion, the preemptive scope of the [two statutes at issue] is governed entirely by the express language in . . . each act. When Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a reliable indicium of congressional intent with respect to state authority, there is no need to infer congressional intent to pre-empt state laws from substantive provisions of the legislation. Such reasoning is a variant of the familiar principle of *expression unius est exclusio*

alterius: Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not preempted.

112 S. Ct. at 2618.[4]

Cipollone's clarification of the limits of implied preemption analysis effectively invalidated the decisions finding implied preemption under the Safety Act. Since *Cipollone*, two Federal courts of appeals and three state courts of last resort have considered the Safety Act's preemptive effect on common law claims. Only the Tenth Circuit has found implied preemption.

The first such case was *Myrick v. Freuhauf Corp.*, 13 F.3d 1516 (11th Cir. 1994), *aff'd sub nom. on other grounds, Freightliner Corp. v. Myrick, supra.* The Eleventh Circuit held that *Cipollone* negated its prior implied preemption decision in *Taylor v. General Motors Corp.*, 875 F.2d 816 (11th Cir. 1989), and that the Safety Act expressly preserved the common law claims at issue. Upon review, this Court unanimously affirmed. While it said that the Eleventh Circuit had misread

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[4]In language particularly relevant to preemption analysis under the Safety Act, this Court added: "[T]here is no general, inherent conflict between federal pre-emption of state warning requirements and the continued vitality of state common law damages actions. For example, in the Comprehensive Smokeless Tobacco Health Education Act of 1985, Congress expressly pre-empted state or local imposition of a 'statement relating to the use of smokeless tobacco products and health' but, at the same time, preserved state law damages actions based on those products." *Id.* (footnote omitted).

Cipollone to hold that implied preemption is barred wherever Congress includes an express preemption clause in a statute, *Myrick* at 1487, it went on to note that the presence of a preemption clause may support an inference foreclosing an implied preemption analysis. It found it unnecessary, however, to address the Eleventh Circuit's holding that, under *Cipollone*, § 1397(k) constitutes a "reliable indicium of Congressional intent" such that it precluding a finding of implied preemption under the Safety Act. Instead, it affirmed the Eleventh Circuit's finding of no preemption on the ground that there was no relevant Federal motor vehicle safety standard in effect. *Id.* at 1485-88.

The Eleventh Circuit recently reaffirmed that its holding in *Myrick v. Freuhauf Corp., supra.*, is still good law in that circuit:

> Since the district court's decision, this circuit has expressly held that standards promulgated under the National Traffic and Motor Vehicle Safety Act do *not* preempt common law claims. [citations omitted] The Supreme Court recently affirmed this circuit's decision. [citations omitted]

Doyle v. Volkswagenwerk Aktiengelellschaft, ____ F.3d ____ (11th Cir. April 24, 1996) (emphasis in original).

The Supreme Court of Arizona also considered the Safety Act's preemptive effect after this Court decided *Cipollone*, but before this Court decided *Myrick*. Relying in part on the Eleventh Circuit's decision in *Myrick*, the Supreme

Court of Arizona unanimously held in *Hernandez-Gomez v. Volkswagen of America, Inc.*, 884 P.2d 183 (Az. 1994), *vacated and remanded*, 115 S. Ct. 1819 (1995), that the Safety Act does not preempt a state common law claim against a manufacturer for failing to incorporate a lap belt into its passive restraint system. After this Court issued its decision in *Myrick*, it vacated the Arizona Supreme Court's decision in *Hernandez-Gomez* and remanded that case for reconsideration in light of its ruling.

The Arizona Supreme Court has recently announced its decision on rehearing finding no preemption of state tort law claims by the Safety Act. *Hernandez-Gomez v. Volkswagen of America, Inc.*, ____ P.2d ____ (Az. May 14, 1996).

The Supreme Court of New Hampshire, in *Ford Motor Co. v. Tebbetts*, *supra.*, was the first state court of last resort or Federal circuit to address the Safety Act's preemptive effect after this Court's decision in *Myrick*. Following the analysis suggested by the *Myrick* opinion, it found that state common law is not expressly preempted by the Safety Act. It then went on to examine whether the Safety Act and/or its history provided a "reliable indicium of Congressional intent with respect to State authority." Based upon this Court's clarification of the preemption analysis set forth in *Cipollone* and *Myrick*, the New Hampshire Supreme Court held that the preemption clause, when read in conjunction with the savings clause, provided a reliable indicium of Congressional intent with respect to state authority leading to the conclusion that there is no need to infer Congressional intent to preempt state law.

The Supreme Court of Indiana was the next high court to consider this issue, in *Wilson v. Pleasant and General Motors Corp., supra.* Engaging in an exhaustive analysis of the effect of *Myrick* and *Cipollone*, it found no preemption stating:

> [W]e hold that in the § 1397(k) savings clause of the Safety Act, Congress made an explicit statement that the kind of state common law claim made by plaintiff in this case is not preempted by the Safety Act or standards promulgated thereunder. And while fully subscribing—as we must—to *Myrick's* teaching that an express preemption clause does not as a rule foreclose implied preemption, for the reasons set forth above, we hold that the § 1397(k) preemption clause entirely forecloses any possibility of implied preemption in this case.

Id. at 336.

The Indiana Supreme Court also went on to analyze the case under an implied preemption analysis even though it had ruled that such an analysis was not necessary. In concluding that implied preemption would not bar the plaintiff's claim, the court stated:

> After examining the stated purposes and policies of the Safety Act, the statutory language at issue, and the legislative and regulatory history, we are convinced that Congress was focused first and foremost on "reducing traffic deaths and injuries and deaths and injuries to

> person resulting from traffic accidents" and that its strategy was to pursue those purposes both through federal regulations and state common law. Because compliance with Rule 208 and recognition of plaintiff's claim here is not "physically impossible" and because recognition of the claim here does not stand "as an obstacle to the accomplishments and execution of the full purposes and objectives of Congress"—indeed, we believe it furthers them—we find no basis for implying preemption of plaintiff's claim.

Id. at 339.

In the last ten years, there have been well over 150 lower court decisions addressing preemption questions similar to those presented by this case. The split among these decisions is broad, growing, and irreconcilable. Indeed, the Superior Court of Pennsylvania noted in *Cellucci v. General Motors Corp.*, ____ A.2d ____ (Pa. Super. Ct. April 30, 1996), that the ultimate answer to this question must be provided by the Supreme Court.

The adverse consequences of the conflict between the courts on this issue are considerable for consumers and injured persons throughout the country. Whether injured persons may seek compensation for injuries caused by these dangerously designed products depends on the state in which the claim is brought, and in some states, whether the claim is brought in a state or Federal court in the same locale. The conflict undermines the purposes of the Safety Act and the Department of Transportation in establishing the FMVSS to "reduce traffic

accidents and deaths and injuries to persons resulting from traffic accidents." 15 U.S.C. § 1381.

Indeed, Honda and its fellow auto manufacturers have already urged this Court to review the issue presented in this case. In December, 1995, Honda (as a member of the Association of International Automobile Manufacturers) argued to this Court that leaving the question of the scope of Federal preemption under the Safety Act unresolved would have "devastating consequences" (*Ford Motor Co. v. Tebbetts*, Brief of The American Automobile Manufacturers Association and the Association of International Automobile Manufacturers, Inc., as *amici curiae*, at Page 2). Honda's *Amici* Brief said:

> Litigation over the preemptive effects of FMVSS 208 has proceeded for a decade, with no end in sight. The lower courts are hopelessly divided, and the decision below . . . is certain to encourage further tort suits. Only this Court can put an end to this controversy.

Ford Motor Co. v. Tebbetts Amicus Brief, Page 20.

We agree. This Court should resolve this conflict now, not wait for still more disagreements among the lower courts.

II. THE DECISION BELOW DIRECTLY CONFLICTS WITH CONGRESS' EXPRESS STATEMENT OF INTENT THAT "COMPLIANCE WITH A FEDERAL MOTOR VEHICLE SAFETY STANDARD . . . SHALL NOT

EXEMPT ANY PERSON FROM ANY LIABILITY UNDER COMMON LAW."

The decision below should also be reviewed because it directly conflicts with Congress' clear and unequivocal preservation of common law claims in the Safety Act. The Tenth Circuit's abrogation of the power of the states to provide for compensation of their actions—in direct contravention of Congress' statement of intent—should not be permitted.

There is a strong presumption against preemption. This presumption derives from the principles of federalism and the core values of the Tenth Amendment. As this Court has repeatedly stated, preemption analysis "start[s] with the assumption that the historical police powers of the States [are] not to be superseded by . . . [the] Federal act unless that [is] the clear and manifest purpose of Congress." *Cipollone*, *supra.*, at 2617 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

In preemption analysis, as with most other matters of statutory construction:

> If the statute contains an express preemption clause, the task of statutory construction must in the first instance focus on the plain wording of the clause which necessarily contains the best evidence of Congress' preemption intent.

CSX Transportation v. Easterwood, 113 S. Ct. 1732, 1737 (1993).

Most importantly, the courts must "fairly but—in light of the strong presumption against preemption—narrowly construe the precise language" of preemption provisions. *Cipollone*, *supra.*, at 2621.

The preemption language of 15 U.S.C. 1392(d), narrowly construed in light of the presumption against preemption, does not expressly preempt common law claims. *See*, *Wood v. General Motors Corp.*, *supra.*; *Kitts v. General Motors Corp.*, *supra.* The preemption provision merely prohibits a State from establishing or continuing in effect a "safety standard" that conflicts with a "Federal motor vehicle safety standard" established under the Act. "Safety standard" is a term used throughout the Act to refer to the administrative standards that the Secretary is authorized to adopt pursuant to the Act. A word is presumed to have the same meaning in all subsections of the same statute. *Estate of Cowart v. Nicklos Drilling Co.*, 112 S. Ct. 2589, 2596 (1992); *Morris-Knudsen Const. v. Director, Office of Worker's Comp Programs*, 461 U.S. 624, 633 (1983). The only sensible reading of the Safety Act's preemption provision is that a "safety standard" promulgated under the Act will only preempt a State legislative or administrative "safety standard" that is not identical to the Federal standard.

If any doubt remains to the inapplicability of the Safety Act's express preemption provision to common law claims, it is dispelled by the Safety Act's express anti-preemption provision—the savings clause—which unambiguously preserves all common law claims:

> Compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law.

15 U.S.C. § 1397(k).

The savings provision is sweeping and unambiguous. Congress wrote the savings clause to do what it says: to preserve all common law claims.

That decision was hardly shocking. Congress wanted the Federal government to set minimum performance standards, but wanted the common law tort system to continue its traditional role of compensating injury victims and creating incentives for design improvements. Indeed, when it added the savings clause to the Safety Act, the U.S. House of Representatives made this point crystal clear. It said:

> It is intended and this subsection [§ 1397(k)] which specifically establishes, that compliance with safety standards is not to be a defense or otherwise to affect the rights of parties under common law particularly those related to warranty, contract, and tort liability.

H.R. Rep. No. 1776, 89th Cong., 2d Sess. 24 (1966).

This Court's holding in *Cipollone* makes it clear that where Congress has spoken directly and clearly on the preemption issue at stake, as it did in the Safety Act, the courts should not turn to implied preemption. This Court's decision in *Freightliner v. Myrick*, *supra.*, does not alter this

conclusion—as the recent decisions in *Tebbetts*, *Wilson*, and *Hernandez-Gomez* demonstrate. In this case, Congress' plainly expressed intent is to preserve, rather than preempt, common law claims. The decision of the Tenth Circuit simply ignores Congress' intent.

Even if the implied preemption analysis were proper here, there would be no implied preemption because neither the Montags' claims nor the evidence the Montags sought to introduce conflict with the Safety Act or NHTSA's regulations. As in *Myrick*, "it is not impossible for [Honda] to comply with both Federal and State law . . .," supra. at 1488. Honda could have met both the performance requirements of the Safety Act and the common law requirement that the product be safe. In selecting a passive restraint system, Honda was not limited (as it told the jury it was) to systems which automatically release the occupant when a door opens during a collision. It was possible for Honda to meet both the passive frontal crash protection requirements of Standard 208 and provide protection from ejection during accidents where the door opens.

Further, the Montags' claims do not "frustrate the accomplishment and execution of the full purposes and objectives of Congress." *Myrick*, *supra.*, at 1488 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). Ejection protection is perfectly consonant with the purposes and objectives of both Congress in enacting the Safety Act and NHTSA in promulgating FMVSS 208. There was absolutely no safety advantage to the Honda 3-point door mounted system over systems which would prevent ejection when used as designed by the manufacturers.

Honda has argued that failure to apply Federal preemption would destroy the uniformity that the Safety Act is supposedly meant to achieve. This is an interesting position given Honda's fierce defense of its right to select the various "options" available under FMVSS 208. The Montags presentation of evidence regarding how Honda exercised that option does not disturb the ability of manufacturers to choose among restraint options since, whatever option they choose, that option must be implemented in a reasonably safe manner. Indeed, what is most shocking about the decision below is that it directly contravenes both Congress' plain words and the clear statement of the Secretary of Transportation in promulgating the relevant version of Standard 208 in 1984. When confronted with the criticism that manufacturers would use the cheapest system to comply with the automatic restraint system requirement, Secretary of Transportation Elizabeth Dole replied:

> The Department does not agree with this contention. It believes that competition, potential liability for any deficient systems, and pride in one's product would prevent this. *(emphasis added)*

49 Fed. Reg. 29000 (1984).

CONCLUSION

For the reasons stated above, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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May 21, 1996

APPENDIX

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 92-S-0135

THE ESTATE OF DIANE MONTAG, by and through Michael Montag, her personal representative of the estate, and MICHAEL MONTAG, individually,

Plaintiffs,

and

FARMERS INSURANCE EXCHANGE, a reciprocal or inter-insurance exchange, and FARMERS INSURANCE EXCHANGE, a reciprocal or inter-insurance exchange as subrogee of THE ESTATE OF DIANE MONTAG,

Plaintiff-Intervenor, and

UNITED OF OMAHA LIFE INSURANCE COMPANY, a Nebraska corporation, as subrogee of THE ESTATE OF DIANE MONTAG,

Plaintiff-Intervenor,

v.

HONDA MOTOR COMPANY, LTD., a Japanese corporation, AMERICAN HONDA MOTOR COMPANY, INC., a California corporation doing business in Colorado, and HONDA RESEARCH AND DEVELOPMENT, INC., a Japanese corporation,

Defendants.

THIS MATTER comes before the court on the Defendants' Motion In Limine to Exclude All Evidence of and References to Restraint Systems Consisting of a Three-Point Manual Safety Belt and an Airbag, filed May 10, 1994. The court has reviewed the motion, the Plaintiffs' Response, the entire case file, the arguments made by counsel in open court and in chambers on June 6, 1994, and the applicable law and is fully advised in the premises.

Defendants ask the court to exclude all evidence of and references to airbag restraint systems, including: (1) that airbag restraint systems were feasible, practical, or available in other 1988 model-year vehicles, (2) that Diane Montag's injuries would have been reduced or prevented if the 1988 Honda Prelude had been equipped with an airbag restraint system, and (3) that the 1988 Prelude is defective or unsafe because it was not equipped with an airbag restraint system. The Defendants believe that the Plaintiffs intend to introduce such evidence through their expert witness, Akio Takaoka. *See* Exhibit E to Defendants' Motion In Limine. The Defendants proffer two reasons that the court should exclude all evidence of and references to airbag restraint systems. First, any claim that

seeks to impose liability on the Defendants for not equipping the 1988 Prelude with an airbag restraint system is preempted by the National Traffic and Motor Vehicle Safety (the Safety Act) and Federal Motor Vehicle Safety Standard 208 (FMVSS 208). Second, the Plaintiffs should be precluded from raising any defect theories not expressed by Plaintiffs' experts in their expert reports at the time of endorsement. Defendants argue that only on March 1, 1994, the last day of discovery, did the Plaintiffs in any way allege that this 1988 Honda Prelude was defective because it was not equipped with an airbag restraint system.

The Plaintiffs respond with essentially four reasons that the Defendants' motion should be denied. First, Plaintiffs argue that the Defendants "abandoned" their preemption argument when they failed to file a summary judgment motion on the preemption issue. The court rejected this argument at the June 6, 1994 hearing. Second, the Plaintiffs argue that this is not a "no-airbag case." The court and the parties are in agreement that this is not a "no-airbag case." It is precisely for this reason that the Defendants seek to exclude the Plaintiffs' "no-airbag" evidence. Third, Plaintiffs argue that the Defendants are attempting to eliminate an essential element of the Plaintiffs' claim - that safer, cost-effective alternatives existed. However, before Mr. Takaoka raised the no-airbag theory of defective design in his March 1, 1994 deposition, the Plaintiffs' theories were that Mrs. Montag's vehicle was defectively designed because: (1) the door latch mechanism and lock were inadequate, and (2) the motion-sensing locking mechanisms were overridden at certain times. *See* Exhibits B, C, and D to Defendants' Motion In Limine; Stipulated Pre-Trial Order dated

May 24, 1994; Amended Complaint dated June 5, 1992. Even without their no-airbag theory, the Plaintiffs have viable theories of design defect and evidence of safer, feasible alternatives. Fourth, Plaintiffs argue that, based on the Supreme Court's decision in *Cipollone v. Liggett Group Inc.*, 120 L. Ed. 2d 407, 112 S. Ct. 2608 (1992), and the Safety Act's savings clause (15 U.S.C. § 1397(k)), the Safety Act does not preempt design defect claims involving manual safety belts with airbags.

Preemption by the Safety Act

Article VI of the United States Constitution provides that the laws of the United States "shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any state to the Contrary notwithstanding." Art. VI, CI. 2. State law that conflicts with federal law is "without effect." *Cipollone*, 112 S. Ct. at 2617, citing *Maryland v. Louisiana*, 451 U.S. 725, 746, 68 L. Ed. 2d 576, 101 S. Ct. 2114 (1981). Consideration of issues arising under the Supremacy Clause starts with the assumption that the historic police powers of the states are not to be superseded by federal law unless that is the clear and manifest purpose of Congress. *Cipollone*, 112 S. Ct. at 2617, citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 91 L. Ed. 1447, 67 S. Ct. 1146 (1947). Therefore, the purpose of Congress is the "ultimate touchstone" of preemption analysis. *Cipollone*, 112 S. Ct. at 2617, citing *Malone v. White Motor Corp.*, 435 U.S. 497, 504, 55 L. Ed. 2d 443, 98 S. Ct. 1185 (1978).

Congress' intent may be "explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Cipollone*, 112 S. Ct. at 2617, citing *Jones v. Rath Packing Co.*, 430 U.S. 519, 525, 51 L. Ed. 2d 604, 97 S. Ct. 1305 (1977). In the absence of an express congressional command, state law is preempted if that law actually conflicts with federal law or if federal law so thoroughly occupies a legislative field "as to make reasonable the inference that Congress left no room for the States to supplement it." *Cipollone*, 112 S. Ct. at 2617 (citations omitted). But, when Congress has considered the issue of preemption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a "reliable indicium of congressional intent with respect to state authority," "there is no need to infer congressional intent to preempt state laws from the substantive provisions" of the legislation. *Cipollone*, 112 S. Ct. at 2618 (citations omitted).

Prior to *Cipollone*, 112 S. Ct. at 2608, the Tenth Circuit found that the Safety Act impliedly preempted the plaintiff's claim for failure to install airbags, following the reasoning of *Wood v. General Motors Corp.*, 865 F.2d 395, 402 (1st Cir. 1988), *cert. denied*, 494 U.S. 1065, 108 L. Ed. 2d 782, 110 S. Ct. 1781 (1990). *Kitts v. General Motors Corp.*, 875 F.2d 787, 789 (10th Cir. 1989), *cert. denied*, 494 U.S. 1065, 108 L. Ed. 2d 783, 110 S. Ct. 1781 (1990). Under the new constraints of *Cipollone*, 112 S. Ct. at 2618, the Tenth Circuit's analysis of the Safety Act in *Kitts*, 875 F.2d at 787, would be limited to express preemption. *See*, *Myrick v. Freuhauf Corp.*, 13 F.3d 1516, 1519-24 (11th Cir. 1994). This court's analysis of the

Safety Act in this case is therefore also limited to express preemption.

Together, Sections 1392(d) and 1397(k) of the Safety Act specifically address congressional intent as to preemption:

> **§ 1392. Motor vehicle safety standards**
>
> (d) **Supremacy of Federal standards; allowable higher standards for vehicles used by Federal or state governments.** Whenever a Federal motor vehicle safety standard established under this title is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard. . . .
>
> **§ 1397. Prohibition against manufacture, sale, delivery, or importation of substandard vehicles and against rendering inoperative certain devices, elements of design or motor vehicle equipment**
>
> (k) **Continuation of common law liability.** Compliance with any Federal motor vehicle safety standard issued under this title does not exempt any person from any liability under common law.

15 U.S.C. § 1392(d); § 1397(k). In compliance with *Cipollone*, 112 S. Ct. at 2618, the court need not and does not consider an implied preemption analysis because the statute contains an express indicium of congressional intent regarding preemption. *See*, *Myrick*, 13 F.3d at 1519-24.

If a statute contains an express preemption clause, the task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' intent. *CSX Transp., Inc. v. Easterwood*, 123 L. Ed. 2d 387, 113 S. Ct. 1732, 1737 (1993). The inquiry in this case is straightforward: the court asks whether the legal duty that is the predicate of the Plaintiffs' state tort law action constitutes a "safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard." *See*, *Cipollone*, 112 S. Ct. at 2621.

Guided by the Tenth Circuit's analysis in *Arkansas-Platte & Gulf Partnership v. Van Waters & Rogers, Inc.*, 959 F.2d 158, 161-64 (10th Cir.), *cert. granted and judgment vacated*, 113 S. Ct. 314 (1992), *Arkansas-Platte & Gulf Partnership v. Van Waters & Rogers, Inc.*, 981 F.2d 1177, 1179 (10th Cir.), *cert. denied*, 126 L. Ed. 2d 30, 114 S. Ct. 60 (1993), and *Kitts*, 875 F.2d at 787, this court believes that, after *Cipollone*, 112 S. Ct. at 2618, the Tenth Circuit would find that Congress, through the Safety Act, has expressly circumscribed the area of motor vehicle safety standards and preserved it for federal law. Following the analysis of the preemption clauses in *Cipollone*, 112 S. Ct. at 2621, and *Arkansas-Platte*, 981 F.2d at 1179, the court concludes that, with § 1392(d) of the Safety

Act, Congress has expressly preempted all state tort claims that are "applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard." 15 U.S.C. § 1392(d). Although other courts have concluded that the language of the Safety Act is too ambiguous to manifest congressional intent to preempt common law tort claims under an express preemption analysis, *see*, *Myrick*, 13 F.3d at 1526, this court believes the Tenth Circuit would find that the Safety Act expressly preempts the Plaintiffs' defective design claim based on the failure to install airbags.

The "savings clause," § 1397(k), does not change the court's conclusion that § 1392(d) expressly preempts the Plaintiffs' product liability claim alleging that the absence of an airbag rendered the vehicle's design faulty. The savings clause indicates that Congress did not intend to occupy the entire field of motor vehicle safety. Because of the savings clause, the Plaintiffs are able to sue on their non-preempted state law tort claims. In addition, the savings clause indicates that compliance with federal motor vehicle safety standards cannot be a complete defense to common law liability. The savings clause does not express any specific congressional intent to preserve state common law actions that a vehicle was defective because it lacked an airbag, effectively circumventing § 1392(d)'s prohibition of nonidentical state standards covering the same aspect of performance as a federal safety standard. *Wood*, 865 F.2d at 407. Congress did not express an intent to undermine the Safety Act through this general savings clause.

An additional reason for precluding the Plaintiffs from attempting to show that this 1988 Honda Prelude was defective because it was not equipped with an airbag restraint system is that this defect theory was not expressed by Plaintiffs' experts in their expert reports at the time of endorsement or at any time before the discovery cutoff. Not until the March 1, 1994 deposition of Mr. Takaoka did the Plaintiffs in any way introduce their theory that this 1988 Honda Prelude was defective because it was not equipped with an airbag restraint system. On October 22, 1993, at the Plaintiffs' request, the discovery cutoff was extended to March 1, 1994. In keeping with the court's requirements regarding endorsement of expert witnesses, expert reports, and discovery cutoffs, the Plaintiffs should be prohibited from introducing evidence that this 1988 Honda Prelude was defective because it was not equipped with an airbag restraint system.

Accordingly, IT IS ORDERED that the Defendants' Motion In Limine to Exclude All Evidence of and References to Restraint Systems Consisting of a Three-Point Manual Safety Belt and an Airbag is GRANTED.

DATED at Denver, Colorado, this day of June, 1994.

BY THE COURT:

Daniel B. Sparr
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 94-1353

THE ESTATE OF DIANE MONTAG, by and through Michael Montag, her Personal Representative of the Estate; MICHAEL MONTAG, individually,

Plaintiff - Appellant,

UNITED OF OMAHA LIFE INSURANCE COMPANY, a Nebraska corporation, as Subrogee of The Estate of Diane Montag,

Plaintiff - Intervenor - Appellant,

v.

HONDA MOTOR COMPANY, LTD., a Japanese corporation; AMERICAN HONDA MOTOR CO., INC., a California corporation doing business in Colorado; HONDA RESEARCH & DEVELOPMENT CO., LTD., a Japanese corporation,

Defendants - Appellees,

TRIAL LAWYERS FOR PUBLIC JUSTICE, PUBLIC CITIZEN, CENTER FOR AUTO SAFETY, MOTOR VOTERS, PRODUCT LIABILITY ADVISORY COUNCIL, INC.,

Amici Curiae.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO. (D.C. No. 92-S-135). D.C. Judge DANIEL B. SPARR.

William James Barber of William James Barber, P.C., Denver, Colorado (Michael J. Mirabella of Norman & Mirabella, P.C., Lakewood, Colorado, for Plaintiffs - Appellants; and John O. Rauch of Downey, Rauch & Sleeman, P.C., Denver, Colorado, for Plaintiff Intervenor - Appellant, with him on the briefs), for Plaintiffs - Appellants.

Malcolm E. Wheeler (John R. Trigg and Robert B. Hunter on the brief) of Parcel, Mauro, Hultin & Spaanstra, P.C., Denver, Colorado for Defendants - Appellees.

(Kenneth S. Geller, Erika Z. Jones, and John J. Sullivan of Mayer, Brown & Platt, Washington, D.C.; Hugh F. Young, Jr., Product Liability Advisory Council, Inc., Reston, Virginia, on the briefs for Amicus Curiae Product Liability Advisory Council, Inc.)

(Arthur H. Bryant and Leslie A. Brueckner, Trial Lawyers for Public Justice, Washington, D.C., on the briefs for Amici Curiae Trial Lawyers for Public Justice, Public Citizen, Center for Auto Safety, and Motor Voters.)

Before MOORE and McKAY, Circuit Judges, and BRETT,[1] Chief District Judge.

McKAY, Circuit Judge.

Plaintiff Michael Montag and Plaintiff-Intervenor United of Omaha Life Insurance Company ("Plaintiffs") appeal from a judgment against them in this products liability action. Plaintiffs claim that Defendants American Honda Motor Company, Honda Motor Co, Ltd., and Honda R & D Co., Ltd. ("Honda") defectively designed the seatbelt in a 1988 Honda Prelude driven by Diane Montag, Mr. Montag's deceased wife. Mrs. Montag was involved in a collision and was thrown from her car despite the fact that she was wearing a seatbelt. The jury rendered a verdict for Honda. Plaintiffs now assert that the trial court made various errors during the course of the trial. We affirm for the reasons that follow.

On her way to work one morning, Diane Montag drove her 1988 Honda Prelude onto a railroad crossing. A freight train was approaching the intersection at the same moment and broadsided the Prelude. Although she was wearing her seatbelt, Mrs. Montag was thrown from her vehicle. She received serious brain injuries from which she died twenty-one months later.

Plaintiffs do not claim that Honda is responsible for the initial collision with the train. Rather, Plaintiffs assert that but

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[1]The Honorable Thomas R. Brett, Chief Judge, United States District Court for the Northern District of Oklahoma, sitting by designation.

for the defectively designed seatbelt, Mrs. Montag would not have been ejected from her car. The seatbelt in question was designed to be automatic: when the door opened, the seatbelt automatically disengaged; and when the door closed, the seatbelt automatically moved into place, securing both torso and waist. The force of the collision with the train caused Mrs. Montag's door to open, and, as a result, the seatbelt automatically disengaged allowing Mrs. Montag to be ejected from the car. Plaintiffs claim that such a seatbelt system is defective under products liability law.

Plaintiffs present several issues on appeal. First, they claim the trial court erred when it concluded that federal motor safety regulations preempted any claim that an airbag was an available alternative safety design. Second, they claim Honda was negligent per se because it failed to comply with certain federal motor safety standards. Thus, they argue the district court erred when it instructed the jury that the seatbelt was presumed not to be defective under Colorado law because Honda had complied with all applicable statutes and regulations. Third, they claim the district court erred when it refused to instruct the jury on the consumer expectations test employed in products liability cases. Fourth, Plaintiffs claim the district court erred when it instructed the jury to compare the negligence of Mrs. Montag with the negligence of Honda under Colorado's comparative fault statute. Finally, they argue the district court made erroneous evidentiary rulings when it allowed Honda to show the jury a film depicting a train-automobile crash, and when the district court restricted the scope of Plaintiffs' lay witness testimony.

I. Federal Preemption

As part of its defective design case, Plaintiffs sought to introduce evidence of a safer, alternative design. Specifically, Plaintiffs intended to show that Honda could have used an alternative restraint system containing, in part, an airbag. Honda filed a motion in limine seeking to exclude the airbag evidence. It argued that federal motor safety regulations preempted Plaintiffs' airbag evidence. The district court agreed and granted Honda's motion. Plaintiffs claim that this decision was erroneous.

We have previously held that 15 U.S.C. § 1392(d) of the National Traffic and Motor Vehicle Safety Act (the "Safety Act"), 15 U.S.C. § 1381 et seq., and Federal Motor Vehicle Safety Standard 208, 49 C.F.R. § 571.208 ("FMVSS" or "Standard" 208) impliedly preempt airbag claims.[2] *Kitts v. General Motors Corp.*, 875 F.2d 787, 789 (10th Cir. 1989), *cert. denied*, 494 U.S. 1065, 108 L. Ed. 2d 783, 110 S. Ct. 1781 (1990). Plaintiffs attempt to circumvent this holding by citing

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[2]Section 1392(d) provides:

> Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard.

FMVSS 208 outlines the seatbelt options available to automobile manufacturers.

to *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 120 L. Ed. 2d 407, 112 S. Ct. 2608 (1992). They argue that, under *Cipollone*, courts may not consider implied preemption where Congress has provided an express preemption clause. Because the Safety Act contains an express preemption clause in § 1392(d), they reason, the *Kitts* implied preemption holding does not apply. The Supreme Court, however, recently rejected this interpretation of *Cipollone*. In *Freightliner Corp. v. Myrick*, 131 L. Ed. 2d 385, 115 S. Ct. 1483 (1995), the Court held that the existence of an express preemption provision does not preclude an implied preemption analysis. *Id.* at 1488. At best, an express preemption clause supports the inference that no implied preemption exists. Id.

The question remains, then, whether the express preemption clause in the Safety Act precludes an implied preemption analysis in this case. In *Myrick*, the Supreme Court engaged in an implied preemption analysis of the Safety Act. Although not explicitly stated, the Court clearly believed that the express preemption clause of the Safety Act did not preclude implied preemption analysis. Thus, our holding in *Kitts* still applies to this case. Plaintiffs were impliedly preempted from presenting airbag evidence.

II. Negligence *Per Se*

Colorado Revised Statutes § 13-21-403(1)(b) creates a rebuttable presumption that a product is not defective if the manufacturer complied with applicable federal or state regulations. The district court, holding that Honda had met the applicable federal safety standards, instructed the jury as to this

presumption. Plaintiffs argue, however, that Honda did not comply with Federal Motor Vehicle Safety Standard 209, 49 C.F.R. § 571.209 ("FMVSS" or "Standard" 209).[3] Thus, they argue not only that the district court's instruction was erroneous but also that Honda was negligent per se.

FMVSS 209 S4.1(b) provides:

> A seatbelt assembly shall provide pelvic restraint whether or not upper torso restraint is provided, and the pelvic restraint shall be designed to remain on the pelvis under all conditions, including collision or roll-over of the motor vehicle.

Because the seatbelt on Mrs. Montag's car did not provide pelvic restraint during the collision, Plaintiffs assert that Honda did not comply with FMVSS 209. Honda, on the other hand, argues that FMVSS 208 specifically authorizes the automatic seatbelt used in Mrs. Montag's Prelude. Furthermore, they argue that seatbelts in compliance with FMVSS 208 are exempt from the requirements of FMVSS 209. Thus, Honda believes it complied with the applicable federal standards.

FMVSS 208 sets forth the various seatbelt options manufacturers may use to meet occupant crash protection standards. Specifically, FMVSS 208 S4.5.3 provides:

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[3]Although Plaintiffs also argue that Honda did not comply with FMVSS 208, this argument appears to be based on Plaintiffs' belief that FMVSS 208 requires compliance with FMVSS 209. Thus, in effect, Plaintiffs only question the applicability of Standard 209.

> [A] seatbelt assembly that requires no action by vehicle occupants (hereinafter referred to as an "automatic belt") may be used to meet the crash protection requirements of any option under S4. and in place of any seatbelt assembly otherwise required by that option."

Plaintiffs do not contend that Honda's seatbelt was not an "automatic belt" within the meaning of FMVSS 208 S4.5.3. Thus, the question becomes whether an automatic seatbelt which otherwise complies with FMVSS 208 must also meet the requirements of FMVSS 209 S4.1(b). These two standards are in conflict because of the nature of an automatic seatbelt. Automatic belts are designed to release when the car door opens. If the car door opens during a collision, however, the automatic belt still releases. Under these circumstances, the seatbelt does not provide pelvic restraint, in direct contravention of FMVSS 209.

Upon further examination of FMVSS 208, we resolve this conflict in favor of Honda. It appears that automatic seatbelts complying with FMVSS 208, with certain exceptions, are exempt from the requirements of FMVSS 209. Specifically, FMVSS 208 S4.5.3.4 provides:

> An automatic belt furnished pursuant to [208] S4.5.3 that is not required to meet the perpendicular frontal crash protection requirements of [208] S5.1 shall conform to the webbing, attachment hardware, and assembly performance requirements of Standard No. 209.

The implication of this regulation is that its inverse also applies: automatic seatbelts which must meet the crash protection requirements of Standard 208 S5.1 are not required to conform to Standard 209. This reading is supported by legislative history and by informal interpretive letters of the National Highway Traffic Safety Administration ("NHTSA"). The NHTSA explained the amendment to Standard 208 which added S4.5.3.4 by stating "On reconsideration, the NHTSA has decided that relief from Standard No. 209 should be afforded if a passive belt is capable of meeting the occupant crash protection requirements of S5.1 in a frontal perpendicular impact and amends S4.5.3 accordingly." 36 F.R. 23725 (Dec. 14, 1971). In an informal interpretive letter, the NHTSA applied this statement when it concluded that automatic seatbelts which comply with Standard 208 need not comply with Standard 209. Plaintiffs' App., vol. I, at 129 (letter from the NHTSA to private individual, 9/10/90). Plaintiffs concede that the Prelude's seatbelt was required to meet the frontal crash protection requirements of Standard 208 S5.1. Appellants' Br. at 28. Thus, Standard 209 does not apply to the Prelude's seatbelt.

Plaintiffs try to circumvent this result by pointing out that the language in FMVSS 208 S4.5.3 only addresses the webbing, attachment hardware, and assembly performance requirements of FMVSS 209. These requirements are contained in FMVSS 209 S4.2, S4.3, and S4.4, respectively. Plaintiffs argue that because FMVSS 209 S4.1(b) (requiring pelvic restraint) was not specifically addressed in FMVSS 208 S4.5.3, it still applies. This interpretation of the regulations, however, ignores the intent of FMVSS 209. Standard 209 sets forth the

technical requirements for the component parts of a seatbelt. As expressed in S4.1(b), these component parts should be able to provide pelvic restraint. In effect, S4.1(b) states the general purpose of Standard 209. The webbing, attachment hardware, and assembly performance requirements merely set forth with specificity the conditions under which a seatbelt must be able to provide this pelvic restraint. It would be illogical to hold that the specific conditions do not apply but that the general condition does apply. Such a result would make FMVSS 209 internally inconsistent. For this reason, we conclude that FMVSS 208 S4.5.3 includes the pelvic restraint requirement in FMVSS 209 S4.1(b). Thus, the district court correctly concluded that Honda had complied with the applicable federal safety standards.

III. Consumer Expectations Test

The Colorado Supreme Court has held that complex product liability claims involving primarily technical and scientific information require use of a risk-benefit test rather than a consumer expectations test. *Camacho v. Honda Motor Co.*, 741 P.2d 1240, 1246-48 (Colo. 1987). The court has listed several factors which should be considered under a risk-benefit analysis but has also noted that this list is not exclusive. *Armentrout v. FMC Corp.*, 842 P.2d 175, 184 (Colo. 1992).

Plaintiffs requested that the district court include the consumer expectations test in the jury instructions as one of the factors to be considered in a risk-benefit analysis. The district court refused to give a consumer expectations instruction.

Plaintiffs claim this was error. They argue that the consumer expectations test can be used in a risk-benefit analysis because the risk-benefit factors listed by the Colorado Supreme Court are non-exclusive. This novel argument ignores, however, the Colorado Supreme Court's express statement that the consumer expectations test is inappropriate in cases involving technical and scientific information. *Camacho*, 741 P.2d at 1246-47. Plaintiffs do not argue that this case does not involve technical and scientific information. Thus, the consumer expectations test should not be used in this case. Engrafting it onto the risk-benefit would render meaningless the express holding of *Camacho*. The district court did not err when it refused to give the requested instruction.

IV. Comparative Fault

> Colorado Revised Statutes § 13-21-406 provides:
>
> In any product liability action, the fault of the person suffering the harm, as well as the fault of all others who are parties to the action for causing the harm, shall be compared by the trier of fact in accordance with this section.

Plaintiffs admitted that Mrs. Montag was negligent in driving her car into the path of an oncoming train. As a result, the district court instructed the jury that they could compare the fault of Mrs. Montag with the fault of Honda. The district court denied Plaintiffs' objection to this instruction.

Plaintiffs argue that C.R.S. § 13-21-406 does not apply to Mrs. Montag's negligence because this is a "crashworthiness" or "second collision" case. Under the crashworthiness doctrine, an automobile manufacturer may be liable "for injuries sustained in a motor vehicle accident where a . . . design defect, though not the cause of the accident, caused or enhanced the injuries." *Camacho v. Honda Motor Co.*, 741 P.2d 1240, 1242-43 (Colo. 1987). From this, Plaintiffs reason that the initial accident is irrelevant to their cause of action. They seek damages only for the enhanced injuries. Thus, they claim Mrs. Montag's negligence in causing the initial accident cannot be compared to Honda's defective design of the seatbelt. Rather, Plaintiffs assert that only Mrs. Montag's misuse of the product, *ie.*, the seatbelt, can be compared to Honda's fault.

We have previously recognized, however, that the term "fault" in § 13-21-406 should be given a broad reading. *Huffman v. Caterpillar Tractor Co.*, 908 F.2d 1470 (10th Cir. 1990). In *Huffman* we found that "the term "fault," as employed in C.R.S. 13-21-406, is more plausibly construed as a general term encompassing a broad range of culpable behavior including, but not limited to, negligence." *Id.* at 1477. Furthermore, fault is not limited to assumption of risk or product misuse. *Id.* Given this broad interpretation of the word "fault," no good reason exists not to allow the jury to compare Mrs. Montag's initial negligence with Honda's fault in designing the seatbelt. In every crashworthiness case, the jury will be required to determine how much of a plaintiff's injuries resulted from the initial collision and how much of the injuries were the result of a second collision. In this case, the jury was required to determine which of Mrs. Montag's injuries resulted

from her initial collision with the train and which of her injuries resulted from the allegedly defective seatbelt. Thus, to an extent, the jury is already comparing the plaintiff's and the defendant's behavior in order to determine causation. Requiring the jury to make a similar determination for the purpose of damages is certainly reasonable and consistent with Colorado's comparative fault statute.

V. Crash Test Videotape

At trial, Honda introduced a videotape depicting a collision between a train and an automobile. It did so for the limited purpose of demonstrating the physical forces at play in a train-automobile accident. Plaintiffs objected, arguing that the tape was inadmissible because it was substantially dissimilar to the actual accident and because it was inflammatory and misleading under Fed. R. Evid. 403. The district court denied Plaintiffs' objections.

Tests and experiments may be dissimilar from the actual accident if they are meant to illustrate general physical principles rather than re-create the accident. *Robinson v. Missouri Pac. R. Co.*, 16 F.3d 1083, 1087 (10th Cir. 1994); *Gilbert v. Cosco Inc.*, 989 F.2d 399, 402 (10th Cir. 1993). If a simulation is offered, however, for the limited purpose of illustrating general principles, the district court should instruct the jury that the evidence is not intended as a re-creation of the accident. *Gilbert*, 989 F.2d at 402. Here, Honda introduced the videotape for the limited purpose of portraying the forces at work in a train-automobile collision. The district court specifically instructed the jury not to consider the videotape as

a re-creation of Mrs. Montag's accident. Given the district court's broad discretion in this area, we cannot say that it erred in allowing the jury to view the videotape.

Similarly, a review of the videotape indicates that it was not so inflammatory or misleading as to require us to reverse the district court. Although the tape does repeatedly show the train's plow handle striking a dummy's head, any prejudicial effect was countered by the district court's limiting instruction and by Plaintiffs' opportunity for vigorous cross-examination. *See*, *Robinson*, 16 F.3d at 1088. Additionally, the jury's verdict indicates that it was not prejudiced by the videotape. The jury specifically found that Mrs. Montag's injuries did not result from the initial collision with the train. *See id.* (stating that verdict indicated jury was not prejudiced by accident re-creation). Thus, the district court did not abuse its discretion when it admitted the videotape.

VI. Lay Witness Testimony

Lastly, Plaintiffs argue that the district court improperly restricted the proposed testimony of their lay witness. This witness had been in an accident similar to Mrs. Montag's accident. While driving a 1987 Honda Accord with a seatbelt similar to the seatbelt in Mrs. Montag's Honda Prelude, the witness's car was struck in the side and she was ejected from the car despite wearing her seatbelt. Plaintiffs wanted the witness to testify as to how the accident occurred, how she was ejected, and that the seatbelt system was "unsatisfactory" and "poorly conceived." Appellants' Br. at 37. Plaintiffs wanted to present this testimony in order to show notice of a defect, to

show existence of a defect, and to refute Honda's expert testimony. Plaintiffs also wanted to use this testimony as evidence of "what a consumer could reasonably expect under the consumer expectation test." *Id.* at 38.

The district court decided it would allow the witness to testify with certain restrictions. First, the court restricted the witness from exceeding the scope of lay opinion:

> I don't have any problem with her saying her car was going fast and letting them ask her the question how fast is fast. But if she starts testifying that the restraint system was defective or that the vehicle was poorly designed or unsatisfactory, that goes far beyond a lay opinion as to what she's testifying about.

Appellants' App., vol. II, at 432. Second, the district court warned counsel that the witness could not "editorialize":

> I will not allow any editorializing about what happened to her as far as other than she was ejected from the vehicle and she found when she returned to the vehicle that her seatbelt was buckled.
>
> . . . I will absolutely restrict -- and you tell her that she'll be held in contempt if she gets into any commentary or any opinions about what a crummy vehicle this was or her -- I forget what her editorializing about Honda's seatbelt system was. But I'll not tolerate it, period. . . .

> She will testify strictly as to the facts of the impact and the fact that she was ejected from the vehicle.

Id., vol. III, at 636. Based on these restrictions, Plaintiffs decided not to present the witness's testimony.

The district court did not abuse its discretion by imposing these restrictions on the witness's testimony. As we have already held, the consumer expectations test does not apply to this case. As a result, testimony from a lay witness that the seatbelt system was "poorly conceived" or "unsatisfactory" would run the risk of presenting improper consumer expectations evidence. Furthermore, testimony from the witness that the seatbelt system was "defective" or "poorly conceived" would intrude into the realm of the expert witness. *See, e.g., Randolph v. Collectramatic, Inc.*, 590 F.2d 844, 846-48 (10th Cir. 1979) (upholding trial court's refusal to allow lay witness to testify that pressure cooker was "defectively designed"). In certain circumstances, a lay witness with specialized knowledge may be allowed to testify as to topics typically reserved for expert witnesses. *See id.* at 848. Plaintiffs, however, have not shown that their lay witness had any type of specialized knowledge. Thus, the district court did not err when it precluded her from testifying about "defects" in the seatbelt system. Finally, the district court's concern with the witness's "editorializing" appears to be nothing more than an attempt to keep her testimony within the proper confines of a lay witness. Although the district court may have been somewhat restrictive, its action did not rise to the level of an abuse of discretion. *See, e.g., Wheeler v. John Deere Co.*, 862 F.2d 1404, 1408 (10th Cir. 1988) (stating that no abuse of

discretion occurred even if district court's ruling was unduly restrictive).

For the foregoing reasons, we AFFIRM.

Supreme Court, U.S.
FILED
JUL 19 1996
CLERK

No. 95-1885

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

ESTATE of DIANE MONTAG, by and through MICHAEL MONTAG, the Personal Representative of the Estate, and MICHAEL MONTAG, individually,
Petitioners,

v.

AMERICAN HONDA MOTOR COMPANY, INC., HONDA MOTOR COMPANY, LTD., a Japanese Corporation, and HONDA R&D CO., LTD., a Japanese Corporation,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether this Court should review a decision of the United States Court of Appeals for the Tenth Circuit holding that the National Traffic and Motor Vehicle Safety Act of 1966 and Federal Motor Vehicle Safety Standard 208 impliedly preempt state tort law claims alleging that an automobile was defectively designed because it was not equipped with airbags and manual lap/shoulder seat belts, even though (1) any opinion by this Court would be merely advisory and would not affect the outcome of the case; (2) procedural defects in Petitioners' attempt to raise the "no-airbag" preemption issue on appeal make this an unsuitable case in which to address that issue in this Court; (3) the Tenth Circuit's decision is consistent with all decisions by other federal courts of appeals addressing this issue; and (4) contrary to Petitioners' contention, the decision below does not conflict with Congress' intent as expressed in 15 U.S.C. section 1397(k).

RULE 29.6 LISTING

American Honda Motor Co., Inc.

Calhac, Inc.
American Honda Finance Corp.
- American Honda Insurance Services, Inc.
- American Honda Receivables Corp.
- American Honda Service Contract Corporation
- Honda Canada Finance, Inc.

Honda of America Mfg., Inc.
- Benton Water Supply
- Honda of America Foundation

Bellemar Parts Industries, Inc.
Honda Power Equipment Mfg., Inc.
American Honda Foundation
Honda Canada, Inc.
Honda De Mexico S.A. De C.V.
American Honda Education Corporation
Honda Performance Development, Inc.
Honda Trading America Corp.
- Honda Trading Canada, Inc.
- Harmony Agricultural Products, Inc.

Celina Aluminum Precision Technology

Honda Motor Co., Ltd.

Japan

- Honda R&D Co., Ltd.
- Honda Engineering Co., Ltd.
- Hadsys, Inc.
- Yutaka Giken Co., Ltd.
- Honda Foundry Co., Ltd.
- Asamagiken Co., Ltd.
- Denshi Giken Co., Ltd.
- Honda Lock Mfg., Co., Ltd.
- Honda Access Sales Corp.
- Honda Motor Parts Service Co., Ltd.
- Honda Access Corp.
- Honda Parts Sales Co., Ltd.
- Honda Finance Co., Ltd.

Suzuka Circuitland Co., Ltd.
Honda Trading Corporation
Honda Leasing Corporation
Honda Sogo Tatemono Co., Ltd.
Honda Verno Shin Tokyo Co., Ltd.
Honda Racing Corporation

North America

American Honda Motor Co., Inc.
Honda North America, Inc.
Honda of America Mfg., Inc.
American Honda Finance Corporation
Indiana Precision Technology, Inc.
Honda R&D North America, Inc.
Honda Trading America Corp.
Honda Engineering North America, Inc.
Honda Canada Inc.

Europe

Honda Austria G.m.b.H.
Honda Europe N.V.
Honda Belgium N.V.
Honda Motor Europe Limited
Honda of the U.K. Manufacturing Limited
Honda France S.A.
Honda Europe Power Equipment S.A.
Honda Deutschland G.m.b.H.
Honda R&D Europe (Deutschland) G.m.b.H.
Honda Nederland B.V.
Honda International Finance B.V.
Honda Italia Industriale-S.p.A.
Honda Automobili Italia S.p.A.
Honda Automovel de Portugal S.A.
Honda Motor de Portugal, S.A.
Honda Automoviles Espana, S.A.
Montesa Honda S.A.
Honda (Suisse) S.A.

Rest of the World

P.T. Honda Prospect Engine Manufacturing
P.T. Honda Federal Inc.
Asian Honda Motor Co., Ltd.
Thai Honda Manufacturing Co., Ltd.
Honda Motor do Brasil Ltda.
Honda de Mexico, S.A. de C.V.
Honda Australia Pty., Ltd.
Honda New Zealand Limited

Honda R&D Co., Ltd.

Honda R&D Taiyo Co., Ltd.
Honda R&D North America, Inc.
Honda R&D Europe (Deutschland) G.m.b.H.
Honda R&D Europe (U.K.) Limited

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

No. 95-1885

ESTATE of DIANE MONTAG, by and through MICHAEL MONTAG, the Personal Representative of the Estate, and MICHAEL MONTAG, individually,
Petitioners,

v.

AMERICAN HONDA MOTOR COMPANY, INC., HONDA MOTOR COMPANY, LTD., a Japanese Corporation, and HONDA R&D CO., LTD., a Japanese Corporation,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

On June 22, 1990, Diane Montag ran a stop sign in Westminster, Colorado, and drove her 1988 Honda Prelude into the path of a Burlington Northern freight train. The train, consisting of six locomotives and 77 cars, weighing approximately 14 million pounds, and travelling at a speed of 34 miles per hour, plowed directly into the driver's door of the Prelude.[1] On March 30,

---

[1] Petitioners state that the train "hit the left rear wheel of the 1988 Honda Prelude that Diane Montag was driving." (Pet. at 4.) Although that is correct as far as it goes, it is akin to saying that

1992, Ms. Montag died from the injuries she incurred in the crash.

Petitioners subsequently brought this product liability action. Their complaint, and later their amended complaint, alleged that the Prelude's door-latch system was defective and that the Prelude's restraint system "would not function properly when the door opened." Neither the complaint nor the amended complaint alleged that the Prelude was defective because it was equipped with an automatic lap/shoulder seat belt system rather than with a manual lap/shoulder seat belt and an airbag.

On May 28, 1992, the district court held a scheduling and status conference. As the court minutes of that conference reflect, the court ordered the parties to identify all expert witnesses, and to produce "detailed reports" of the experts' opinions, no later than December 1, 1992. The court also ordered that expert testimony at trial would be "limited to [the] extent of [the] report" and that discovery would close on March 1, 1994.

On January 7, 1993, Akio Takaoka, a witness retained by Petitioners to testify about purported defects in the design of the 1988 Prelude, submitted an expert report stating his opinions about the two defects alleged in the amended complaint. Neither he nor any other expert opined that the Prelude should have been equipped with a manual lap/shoulder seat belt and an airbag, rather than with the automatic lap/shoulder seat belt system actually installed.

Respondents took Takaoka's deposition on March 1, 1994, the last day for discovery. During his deposition, Takaoka attempted to interject a new theory of liability into the case when, for the first time, he disclosed that

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the iceberg which struck the Titanic damaged stateroom 104 of the ship. In truth, the uncontradicted record shows that the train demolished the entire driver's side of the Prelude.

he intended to express the opinion that the Prelude was defective because it was not equipped with a manual lap/shoulder seat belt and an airbag.

On May 10, 1994, Respondents filed a motion in limine to exclude testimony by Takaoka "that the 1988 Prelude was defective because Honda could have, but did not, equip the 1988 Preclude with an airbag restraint system." Specifically, the motion sought to exclude

> all evidence of and references to airbag restraint systems, including: (1) that airbag restraint systems were feasible, practical, or available in other 1988 model-year vehicles, (2) that Diane Montag's injuries would have been reduced or prevented if the 1988 Honda Prelude had been equipped with an airbag restraint system, and (3) that the 1988 Prelude is defective or unsafe because it was not equipped with an airbag restraint system.

(Pet. at 2a.) Respondents argued that such evidence was inadmissible because it (1) would "convert [Petitioners'] heretofore ordinary defect claim into a 'no-airbag' claim preempted by Federal statutes and safety regulations" and (2) would violate the court's order limiting experts' opinions to those expressed in their expert reports.

In opposing the motion in limine, Petitioners argued that their claim was not a "no-airbag" claim, but a claim that the Prelude should have been equipped with a manual lap/shoulder seat belt. They stated:

> In the context of this case, it is not the airbag that is important to Plaintiffs' design claims. The importance of the airbag is that it permits the designer/manufacturer to use a manual safety belt which would provide pelvic restraint in the event a door opens during an accident.[2]

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[2] In fact, however, an airbag was not needed in 1988 model-year vehicles to "permit" the installation of manual seat belts; rather, Federal Motor Vehicle Safety Standard 208 at that time gave each manufacturer the choice of installing *either* manual seat belts *or*

Petitioners contended that the Safety Act and Safety Standard 208 did not "preempt design defect claims," such as theirs, "involving manual safety belts with airbags."

On June 9, 1994, the district court granted Respondents' motion in limine. The court observed that "this is not a 'no-airbag' case" and that Petitioners were attempting to bring a "no-airbag" claim through the back door by having Takaoka testify as to a "no-airbag theory of defective design . . . ." (Pet. at 3a.) The court then held the back-door "no-airbag" defect theory preempted. (*Id.* at 8a.)

The court also held Takaoka's testimony on Petitioners' "no-airbag" theory inadmissible for the independent reason that Petitioners had failed to timely raise it. The court stated:

> An additional reason for precluding the Plaintiffs from attempting to show that this 1988 Honda Prelude was defective because it was not equipped with an airbag restraint system is that this defect theory was not expressed by Plaintiffs' experts in their expert reports at the time of endorsement or at any time before the discovery cutoff. Not until the March 1, 1994 deposition of Mr. Takaoka did the Plaintiffs in any way introduce their theory that this 1988 Honda Prelude was defective because it was not equipped with an airbag restraint system. On October 22, 1993, at the Plaintiffs' request, the discovery cutoff was extended to March 1, 1994. *In keeping with the court's requirements regarding endorsement of expert witnesses, expert reports, and discovery cutoffs, the Plaintiffs should be prohibited from introducing evidence that this 1988 Honda Prelude was defective because it was not equipped with an airbag restraint system.*

(*Id.* at 9a (emphasis added).)

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passive restraints, such as airbags, in up to 75 percent of the manufacturer's vehicles. *See* p. 9 & n.5, *infra*.

At trial, Petitioners did not adduce, make an offer of proof on, or otherwise identify, any evidence about an airbag and manual seat belt restraint system. After trial, the jury found that Respondents were not liable to Petitioners and that Diane Montag's conduct was the sole cause of her accident.[3]

Petitioners appealed to the United States Court of Appeals for the Tenth Circuit. In their opening brief they identified nine issues on appeal. The only issue that dealt with evidence about airbags stated: "Did the trial court err by concluding that express pre-emption precluded introduction of the airbag/manual belt system as a safer design alternative." Petitioners did not appeal the district court's ruling that evidence on their "no-airbag" theory was inadmissible because they had failed to comply with the court's scheduling order.

In their opening brief Petitioners also ignored the facts that their expert witness had stated in deposition that he intended to testify that the Prelude was defective because it was not equipped with a restraint system using an airbag and manual lap/shoulder seat belt, and that Respondents' motion in limine was directed to that proposed testimony. Instead, Petitioners for the first time asserted that they had not intended to present evidence about a restraint system using airbags and manual lap/shoulder seat belts through their own experts; rather, they said, they at all times had planned to introduce evidence of this alternative design through Respondents' employees.

On January 22, 1996, the court of appeals affirmed the judgment of the district court. *Montag v. Honda Motor Co.*, 75 F.3d 1414 (10th Cir. 1996). After noting that it had previously held "no-airbag" claims impliedly preempted in *Kitts v. General Motors Corp.*, 875 F.2d 787 (10th Cir. 1989), *cert. denied*, 494 U.S.

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[3] Contrary to Petitioners' representation to this Court (*see* Pet. at 7), the jury did *not* "specifically [find] that Mrs. Montag's injuries were caused by her ejection from her vehicle."

1065 (1990), the court examined this Court's subsequent decisions in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), and *Freightliner Corp. v. Myrick*, —— U.S. ——, 115 S. Ct. 1483 (1995), to determine whether they mandated a different result.[4] *See* 75 F.3d at 1417. The court of appeals held they did not, stating: "[O]ur holding in *Kitts* still applies to this case. Plaintiffs were impliedly preempted from presenting airbag evidence." *Id.*

REASONS FOR DENYING THE PETITION

I. THE PETITION SHOULD BE DENIED BECAUSE THE DISTRICT COURT EXCLUDED EVIDENCE OF PETITIONERS' "NO-AIRBAG" THEORY OF DEFECTIVE DESIGN ON TWO GROUNDS, ONLY ONE OF WHICH WAS APPEALED, AND A DECISION BY THIS COURT ON THE PREEMPTION ISSUE THEREFORE WOULD NOT CHANGE THE OUTCOME OF THE CASE

For more than 200 years, this Court has held that it "is without power to give advisory opinions." *E.g., Alabama State Fed'n of Labor v. McAdory*, 325 U.S. 450, 461 (1945) (quoting *Hayburn's Case*, 2 U.S. (2 Dall.) 408 (1792); *North Carolina v. Rice*, 404 U.S. 244, 246 (1971) (Court has "frequently repeated that federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them"). In *United States v. Hastings*, 296 U.S. 188 (1935), this Court specifically held that it should not review a federal district court's decision based on two independent grounds, one of which had not been presented for review:

> A distinct question is presented where the District Court has not placed its decision solely upon the

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[4] As the court of appeals' opinion shows on its face, Petitioners' assertion that the "Tenth Circuit did not analyze the effects of the holdings of" *Cipollone* and *Myrick* "on its previous decision in *Kitts*" is incorrect. (*See* Pet. at 7.)

> invalidity or construction of the statute, but has also sustained the demurrer or granted the motion to quash the indictment upon wholly independent grounds of insufficiency. In such a case the judgment of the District Court would remain in effect and the defendant would go free of the indictment, whatever views we might express upon appeal as to the construction or validity of the statute. We could not reverse the judgment upon questions not before us. An indictment not merely attacked, but found to be invalid on grounds not open here, would be made the vehicle of an effort to obtain from this Court an expression of an abstract opinion, which might or might not fit a subsequent prosecution of the same defendant or others, but would not determine the instant case. Review of a judgment which we cannot disturb, because it rests adequately upon a basis not subject to our examination, would be an anomaly.
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> * * * *
>
> If the judgment is independently based, and in that respect is not open to correction or reversal, we are of the opinion that this Court should not entertain the . . . appeal.

Id. at 193-94.

The same principle applies here. Here, the district court excluded evidence of Petitioners' "no-airbag" theory on two independent grounds: (1) Petitioners asserted a back-door "no-airbag" claim that was preempted, and (2) Petitioners' belated attempt to introduce a new design defect claim violated the court's scheduling order. (Pet. at 3a.) Petitioners did not appeal the court's second, independent ground for excluding "no-airbag" evidence.

In their opening brief, and in their docketing statement, in the Tenth Circuit, Petitioners identified nine issues on appeal, only one of which dealt with evidence about airbags. That appeal issue stated: "Did the trial court err by concluding that express pre-emption precluded intro-

duction of the airbag/manual belt system as a safer design alternative." Petitioners did not identify as an appeal issue the district court's ruling that evidence with respect to Petitioners' "no-airbag" theory was inadmissible because they had failed to comply with the court's pretrial order. Furthermore, no mention of, or argument on, that issue appeared in Petitioners' opening brief. Accordingly, Petitioners waived the issue, and it was not before the court of appeals. *See, e.g.*, Fed. R. App. P. 28(a)(3), (5); *Nagle v. Alspach*, 8 F.3d 141, 143 (3d Cir. 1993) ("When an issue is either not set forth in the statement of issues presented or not pursued in the argument section of the brief, the appellant has abandoned and waived that issue on appeal.").

As a result, in this case, as in *Hastings*, any opinion by this Court on the preemption issue would be an advisory opinion. Whatever views the Court might express on that issue, the judgment of the district court would remain in effect. Accordingly, the rule articulated in *Hastings* applies here: Because the ruling below is "independently based" on a ground that has not been appealed "and in that respect is not open to correction or reversal," this Court "should not entertain the appeal."

II. THE PETITION SHOULD BE DENIED BECAUSE IT DOES NOT SQUARELY PRESENT THE "NO-AIRBAG" PREEMPTION ISSUE AND WOULD REQUIRE THE COURT TO DECIDE UNPRESERVED EVIDENTIARY ISSUES

This case is inappropriate for review for the further reason that it neither squarely nor cleanly presents the issue stated in the petition—namely, whether "no-airbag" claims are preempted. Petitioners concede that they did not even "contend that an airbag would have made a difference in this case." (Pet. at 6.) Rather, Petitioners contended that if the Prelude had been equipped with a manual lap/shoulder seat belt system mounted to the

body of the car, rather than an automatic lap/shoulder seat belt system with one end mounted to the door, "Diane Montag would not have been ejected from the vehicle and would not have sustained the injuries which ultimately led to her death." (Pet. at 4.) Therefore, as the district court noted, Petitioners agreed with the court that "this is not an airbag case."

In addition, although Petitioners suggest that the district court's ruling prevented them from attempting "to prove that there were safer, economical alternatives to the automatic safety belt system selected and designed by Honda" (Pet. at 6), the truth is that their response to the motion in limine to exclude "no-airbag" evidence identified no fewer than three alternative designs that they claimed were safer than the restraint system in the 1988 Honda Prelude and that did not include airbags. In particular, the district court's ruling did not prevent Petitioners from arguing that Respondents should have installed body-mounted manual lap/shoulder seat belts, rather than automatic lap/shoulder seat belts, in the 1988 Prelude. No mention of airbags was needed in order to make that argument because, as Petitioners concede, an airbag would have done nothing to prevent the ejection of Ms. Montag in what was a pure side-impact collision.[5]

Understandably, under these circumstances, the district court found that "[e]ven without their no-airbag theory, the Plaintiffs have viable theories of design defect and evidence of safer feasible alternatives." (*Id.* at 4a.) In short, evidence about airbags, whether used with automatic lap/shoulder seat belts or with manual lap/shoulder seat belts, was 100 percent irrelevant to Petitioners' side-

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[5] Because the Prelude in question was a 1988 model-year vehicle, Federal Motor Vehicle Safety Standard 208 permitted manual lap/shouder seat belts, as opposed to automatic seat belts or airbags, in up to 75 percent of each manufacturer's automobiles. *See* 49 C.F.R. § 571.208 (1988).

impact ejection claim. Such evidence would have done nothing to enhance Petitioners' arguments that manual seat belts were preferable to automatic seat belts. Accordingly, this case presents nothing more than an unexceptional challenge to a trial court's exclusion of evidence, and Petitioners do not present any compelling reason for granting the petition.

Moreover, the petition presents an unpreserved challenge to the district court's exclusion of evidence. *See* Fed. R. Evid. 103. In their petition, Petitioners assert that the district court's ruling precluded them from introducing into evidence documents written by, and the deposition testimony of, Ksazou Higuchi and Noboru Hashimoto, two witnesses who testified on behalf of Honda. But Petitioners never offered those materials into evidence or even identified them to the district court, either in response to the motion in limine or at trial.

As discussed above (*see supra* pp. 2-4), Respondents filed their motion in limine to exclude testimony by Petitioners' expert Akio Takaoka that they could have equipped the 1988 Prelude with a restraint system consisting of an airbag and a manual lap/shoulder seat belt and that the Prelude was defective because it was not so equipped. In opposing that motion, Petitioners did not contest Respondents' description of Takaoka's intended testimony, and Petitioners made no offer of proof about, or otherwise identified, any evidence other than Takaoka's testimony that would be prohibited by the motion. Because of Respondents' silence, therefore, the district court had no knowledge of evidence other than Takaoka's testimony that was excluded by its ruling. *See* Pet. at 2a ("Defendants ask the court to exclude all evidence of and references to airbag restraint systems . . . . The Defendants believe that the Plaintiffs intend to introduce such evidence through their expert witness, Akio Takaoka.").

Petitioners followed the same course at trial, making no attempt to introduce, and no offer of proof regarding, any evidence about restraint systems with airbags and manual lap/shoulder seat belts, including the documents and deposition testimony they now claim were improperly excluded. Specifically, although the district court's order only prohibited Petitioners "from introducing evidence that this 1988 Honda Prelude was defective because it was not equipped with an airbag restraint system" (Pet. at 9a), and although Petitioners now contend that the evidence they intended to introduce would not have been directed to that issue, Petitioners (1) did not make an offer of proof of, or otherwise identify, such evidence to the district court; (2) did not argue that such evidence was admissible and necessary to rebut Respondents' testimony or to impeach or otherwise cross-examine Respondents' witnesses; (3) did not argue that such evidence was admissible and necessary because Respondents had opened the door to the issue; and (4) did not ask the court to reconsider the order in limine or to clarify its scope.

In short, Petitioners did nothing to identify the documents and deposition testimony to the district court, did nothing to introduce the documents and deposition testimony at trial, and did nothing to have the district court rule on the admissibility of the documents and deposition testimony. Accordingly, Petitioners failed to preserve the issue for appellate review. *See* Fed. R. Evid. 103 (a)(2).

These circumstances militate against granting the petition. This Court has often stated that when a case can be decided on both non-constitutional and constitutional grounds, the Court should not decide the constitutional question. *See, e.g., Harmon v. Brucker*, 355 U.S. 579, 581 (1958) (recognizing "duty to avoid deciding constitutional questions presented unless essential to proper disposition of a case"); *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) (" 'It is not the habit of the Court to decide ques-

tions of a constitutional nature unless absolutely necessary to a decision of the case.'") (quoting *Burton v. United States*, 196 U.S. 283, 295 (1905)).

Finally, the true "no-airbag" preemption issue is currently pending in several appellate courts in cases that present that issue squarely, without the evidentiary and procedural complexities and imperfections that exist here. *See, e.g., Harris v. Ford Motor Co.*, No. 94-56527 (9th Cir.) (petition for interlocutory review granted on November 7, 1994; oral argument held on April 9, 1996). Because it is likely that the losing party in one or more of those cases will petition this Court for a writ of certiorari,[6] the Court will most assuredly have the opportunity to address the "no-airbag" preemption issue in an appropriate case in the near future. The Court should wait for such a case in which to address that issue.

III. CONTRARY TO PETITIONERS' CONTENTION, THE TENTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH ANY HOLDING OF ANY OTHER CIRCUIT THAT HAS RULED ON THE "NO-AIRBAG" PREEMPTION ISSUE

Petitioners contend, incorrectly, that the court of appeals' decision in this case "directly conflicts with the

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[6] This is at least the eighth time in the last seven years in which a litigant has sought review of the "no-airbag" preemption issue by this Court. *See, e.g., Pokorny v. Ford Motor Co.*, 902 F.2d 1116 (3rd Cir.), *cert. denied*, 498 U.S. 853 (1990); *Wood v. General Motors Corp.*, 865 F.2d 395 (1st Cir. 1988), *cert. denied*, 494 U.S. 1065 (1990); *Taylor v. General Motors Corp.*, 875 F.2d 816 (11th Cir. 1989), *cert. denied*, 494 U.S. 1065 (1990); *Kitts v. General Motors Corp.*, 875 F.2d 787 (10th Cir. 1989), *cert. denied*, 494 U.S. 1065 (1990); *Nissan Motor Corp. in U.S.A. v. Superior Court*, 212 Cal. App. 3d 980, 261 Cal. Rptr. 80 (1989), *cert. denied*, 494 U.S. 1066 (1990); *Wickstrom v. Maplewood Toyota, Inc.*, 416 N.W.2d 838 (Minn. App. 1987), *cert. denied*, 487 U.S. 1236 (1988). Indeed, only six months ago this Court denied a petition for a writ of certiorari in a case that squarely and clearly presented that issue and no other. *See Tebbetts v. Ford Motor Co.*, 665 A.2d 345 (N.H. 1995), *cert. denied*, —— U.S. ——, 116 S. Ct. 773 (1996).

decisions of numerous Federal circuits and state courts of last resort." (Pet. at 8 & n.3.) In truth, none of the federal court of appeals decisions cited by Petitioners addresses the "no-airbag" preemption issue at all; nor do five of the cited decisions by state courts of last resort. In ten of the cited cases, preemption was not in issue and the word "preemption" does not appear even once in the courts' opinions.[7] One of the other cases addresses only the doctrine of field preemption, which is not at issue in "no-airbag" preemption cases.[8] Ten of the cases merely confirm that compliance with Federal Motor Vehicle Safety Standards does not constitute a defense to a product liability action if none of those standards governs the specific design feature alleged by a plaintiff to be defective.[9] Indeed, six of the cases involved allegations of defects in vehicles designed and manufactured before *any* pertinent federal Safety Standard had been promulgated.[10]

Moreover, 15 of the cases involved vehicle features other than airbags, and in two instances the same courts

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[7] *See Knippen v. Ford Motor Co.*, 546 F.2d 993 (D.C. Cir. 1976); *Dawson v. Chrysler Corp.*, 630 F.2d 950 (3d Cir. 1980), *cert. denied*, 450 U.S. 959 (1981); *Stonehocker v. General Motors Corp.*, 587 F.2d 151 (4th Cir. 1978); *Shipp v. General Motors Corp.*, 750 F.2d 418 (5th Cir. 1985); *Sours v. General Motors Corp.*, 717 F.2d 1511 (6th Cir. 1983); *Schwartz v. American Honda Motor Co.*, 710 F.2d 378 (7th Cir. 1983); *Larsen v. General Motors Corp.*, 391 F.2d 495 (8th Cir. 1968); *Fox v. Ford Motor Co.*, 575 F.2d 774 (10th Cir. 1978); *Volkswagen of Am., Inc. v. Young*, 321 A.2d 737 (Md. App. 1974); *H.P. Hood & Sons, Inc. v. Ford Motor Co.*, 345 N.E.2d 683 (Mass. 1976).

[8] *See Arbet v. Gussarson*, 225 N.W.2d 431 (Wis. 1975).

[9] *See Knippen, supra; Dawson, supra; Stonehocker, supra; Dorsey v. Honda Motor Co.*, 655 F.2d 650 (5th Cir. 1981), *modified*, 670 F.2d 21, *cert. denied*, 459 U.S. 880 (1982); *Shipp, supra; Schwartz, supra; Larsen, supra; General Motors Corp. v. Edwards*, 482 So. 2d 1176 (Ala. 1985); *Young, supra; Arbet, supra.*

[10] *See Knippen, supra; Stonehocker, supra; Sours, supra; Schwartz, supra; Larsen, supra; Arbet, supra.*

later held "no-airbag" claims preempted.[11] As the Third Circuit stated in *Pokorny v. Ford Motor Co.*, 902 F.2d 1116 (3d Cir.), *cert. denied*, 498 U.S. 853 (1990), distinguishing its earlier decision in *Dawson v. Chrysler Corp.*, 630 F.2d 950 (3d Cir. 1980), *cert. denied*, 450 U.S. 959 (1981):

> [D]espite [plaintiff's] arguments to the contrary, our decision in *Dawson* does not prohibit us from holding that [plaintiff's] common law action is impliedly pre-empted by the Safety Act and Safety Standard 208. . . . [*Dawson*] did not involve pre-emption. . . . There was no federal standard governing the particular design said to be defective in *Dawson*, and thus there was no asserted conflict between federal standards and common law liability.

Pokorny, 902 F.2d at 1122.

Petitioners similarly err in contending that the Tenth Circuit's holding in this case places it in conflict with the Eleventh Circuit. In the only "no-airbag" preemption case ever decided by the Eleventh Circuit, that court held "no-airbag" claims preempted. *Taylor v. General Motors Corp.*, 875 F.2d 816 (11th Cir. 1989), *cert. denied*, 494 U.S. 1065 (1990). Petitioners argue (Pet. at 11-12) that the Eleventh Circuit reversed course in *Myrick v. Freuhauf Corp.*, 13 F.3d 1516 (11th Cir. 1994), *aff'd sub nom. on other grounds, Freightliner Corp. v. Myrick, supra*, and "reaffirmed" that reversed course in *Doyle v. Volkswagenwerk Aktiengelellschaft*, 81 F.3d 139 (11th Cir. 1996), but that argument is flawed in several respects.

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[11] *Compare, e.g., Pokorny v. Ford Motor Co.*, 902 F.2d 1116 (3d Cir.), *cert. denied*, 498 U.S. 853 (1990) ("no-airbag" claims preempted), *with Dawson v. Chrysler Corp.*, 630 F.2d 950 (3d Cir. 1980), *cert. denied*, 450 U.S. 959 (1981) (compliance with federal safety standards was not complete defense to claim that vehicle was defective because of noncontinuous body frame); *Montag v. Honda Motor Co.*, 75 F.3d 1414 (10th Cir. 1996) ("no-airbag" claims preempted), *and Kitts v. General Motors Corp.*, 875 F.2d 787 (10th Cir. 1989), *cert. denied*, 494 U.S. 1065 (1990) (same), *with Fox v. Ford Motor Co.*, 575 F.2d 774 (10th Cir. 1978)

First, *Myrick* involved antilock brakes in trucks, not airbags in cars, and the preemptive effect of Federal Motor Vehicle Safety Standard 208 was neither before the Eleventh Circuit nor discussed by it. That is of no minor moment, because the difference between truck antilock brakes and Federal Motor Vehicle Safety Standard 121, on the one hand, and airbags and Federal Motor Vehicle Safety Standard 208, on the other, is considerable. Most importantly, whereas the Department of Transportation and the Department of Justice explcitly stated that claims based on the absence of truck antilock brakes were not intended to be preempted by Safety Standard 121, the same agencies have three times explicitly stated that "no-airbag" claims were intended to be preempted by Safety Standard 208. *Compare* Brief for the United States as *Amicus Curiae* at 29-30, *Freightliner Corp. v. Myrick,* No. 94-286 (U.S. Dec. 1994) (truck antilock brake claims not preempted by Safety Standard 121), with *id.* at 28-29 ("no-airbag" claims preempted by Safety Standard 208); Brief for United States as *Amicus Curiae* at 13-14, *Wood v. General Motors Corp.,* 494 U.S. 1065 (1990) (No. 89-46) (same); Brief of the United States as *Amicus Curiae* at 32-35, *Ritt v. General Motors Corp.,* No. 88-1822 (7th Cir. 1989) (same).

Second, although it affirmed the Eleventh Circuit's judgment regarding antilock brakes in *Myrick,* this Court did so because there was "simply no federal standard for a private party to comply with. Nothing in the Safety Act or its regulations currently regulates the use of [antilock brake] devices. . . . In the absence of a promulgated safety standard, the Act simply fails to address the need for [antilock brakes] at all." —— U.S. at ——, 115 S. Ct. at 1488. This Court flatly rejected as "without merit" the portion of the Eleventh Circuit's opinion holding that, because of this Court's decision in *Cipollone,*

(compliance with federal safety standards was not complete defense to claim that rear-seat lap safety belt was defectively designed).

"implied preemption cannot exist where Congress has chosen to include an express pre-emption clause in a statute." —— U.S. at ——, 115 S. Ct. at 1487. Because it was only that erroneous portion of the Eleventh Circuit's *Myrick* opinion which could be said to support a broad conclusion that no common law claim of any kind could be impliedly preempted by any Federal Motor Vehicle Safety Standard, and because this Court held that portion of the opinion to be erroneous, the Eleventh Circuit's *Myrick* opinion holding truck antilock brake claims not preempted cannot now credibly be said to have overruled the same court's *Taylor* opinion holding "no-airbag" claims preempted.

Third, although Petitioners argue that the Eleventh Circuit in *Doyle* "reaffirmed" its holding in *Myrick* and thereby somehow found "no-airbag" claims not preempted, it did no such thing. The claimed design defect in *Doyle* was not an absence of airbags, but "the absence of a lap belt." *Doyle*, 81 F.3d at 141. Moreover, the court of appeals in *Doyle* was not reviewing a preemption decision, but a district court ruling "[f]inding plaintiffs' claims precluded *under Georgia law*," *id.* (emphasis added), and the court of appeals certified to the Supreme Court of Georgia that "unanswered question of Georgia law that is determinative of this appeal," *id.* at 140. Thus, the court of appeals could not have "reaffirmed" its *Myrick* preemption holding in *Doyle*, because that issue was not before the court in *Doyle*.

To the extent that the Eleventh Circuit in *Doyle* indicated any view regarding preemption of "no-airbag" claims, it indicated that *Taylor* had correctly held such claims preempted because of the conflict between such claims and applicable federal law. The court stated:

> While *Taylor* endorses the Georgia Court's ruling in [*Honda Motor Co. v.*] *Kimbrel*, [189 Ga. App. 414, 376 S.E.2d 379 (1988), that "no-airbag" claims cannot be maintained under Georgia law],

> it makes clear that preemption exists only when there is a conflict between federal and state law, *as there would have been had Kimbrel been decided otherwise.*

Doyle, 81 F.3d at 142 (emphasis added).

Thus, none of the federal court of appeals decisions cited by Petitioners held "no-airbag" claims not preempted. The court of appeals' decision in this case holding "no-airbag" claims preempted is in fact consistent with every other federal court of appeals decision addressing that issue. *See, e.g., Pokorny*, 902 F.2d 1116; *Taylor*, 875 F.2d 816; *Kitts*, 875 F.2d 787; *Wood v. General Motors Corp.*, 865 F.2d 395 (1st Cir. 1988), *cert. denied*, 494 U.S. 1065 (1990). Each of those decisions explicitly held "no-airbag" claims preempted.

Petitioners' description of recent decisions by state courts of last resort is also incorrect. Petitioners erroneously assert that, following this Court's vacatur and remand in *Hernandez-Gomez v. Volkswagen of America, Inc.*, 884 P.2d 183 (Ariz. 1994), *vacated and remanded*, —— U.S. ——, 115 S. Ct. 1819 (1995), the Arizona Supreme Court "announced its decision on rehearing finding no preemption of state tort law claims by the Safety Act. *Hernandez-Gomez v.* [*Leonardo*] 917 P.2d 238 (Ariz. 1996)." (Pet at 13.) In fact, the Arizona Supreme Court merely found no preemption of a *Doyle*-type claim—namely, that a Volkswagen automobile was defective because it did not have a lap belt. The court explicitly recognized that other common law claims are preempted by the Safety Act. The court stated:

> It is clear to us, however, that at the very least *Myrick* stands for the proposition that common-law claims that expressly and directly conflict with the text of the [federal] standard are preempted by the preemption clause; common-law claims that do not

> expressly conflict may still be preempted if they violate one of the articulated rules for implied preemption . . . .

Hernandez-Gomez, 917 P.2d at 243. "No-airbag" claims fit squarely within the category the court described as claims that "are preempted."

Petitioners' description of "no-airbag" preemption decisions by state courts of last resort is also incomplete, because it does not include a decision issued by the Mississippi Supreme Court on May 23, 1996, two days after the petition in this case was filed. In *Cooper v. General Motors Corp.*, No. 92-CA-01334-SCT, 1996 WL 272362 (Miss. May 23, 1996), the Mississippi Supreme Court, like all of the federal courts of appeals that have addressed the issue, held "no-airbag" claims preempted by federal law.

Because the federal courts of appeals that have addressed the issue have unanimously held "no-airbag" claims preempted, and because more than 140 other courts have held such claims preempted, Petitioners can neither correctly assert that the decision below conflicts with a decision of another United States Court of Appeals nor justifiably assert that the Tenth Circuit "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power . . . ." Rule 10(a), Rules of the Supreme Court of the United States. As shown in sections I and II above, resolution by this Court of the conflict between the vast majority of courts that have held "no-airbag" claims preempted and the small number of state courts [12] that have held to the contrary should await a case that more appropriately presents the issue for consideration.

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[12] *See, e.g., Wilson v. Pleasant*, 660 N.E.2d 327 (Ind. 1995); *Tebbetts v. Ford Motor Co.*, 665 A.2d 345 (N.H. 1995), *cert. denied*, —— U.S. ——, 116 S. Ct. 773 (1996); *Loulos v. Ford Motor Co.*, 882 S.W.2d 149 (Mo.App. 1994).

IV. CONTRARY TO PETITIONERS' CONTENTION, THE DECISION BELOW DOES NOT CONFLICT WITH CONGRESS' INTENT AS EXPRESSED IN 15 U.S.C. SECTION 1397(k)

Petitioners characterize 15 U.S.C. section 1397(k) as an "express anti-preemption provision" and a "savings clause" that "unambiguously preserves all common law claims." (Pet. at 18-19.) That characterization is wrong in every respect, and it does not provide an appropriate basis for review by this Court.

Section 1397(k) provides, "Compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law." 15 U.S.C. § 1397(k). This clause establishes that compliance with Federal Motor Vehicle Safety Standards does not constitute an affirmative defense to common law claims.

The language of section 1397(k) demonstrates that it is not an "express anti-preemption provision" and in fact does not address preemption at all. First, the true preemption provision, 15 U.S.C. section 1392(d), is explicitly entitled "Supremacy of federal standards," whereas section 1397(k) has a title that makes no reference to the Supremacy Clause or to preemption. Section 1397(k) is simply entitled "Continuation of common law liability."

Second, as the First Circuit correctly recognized in *Wood*, 865 F.2d at 401 n.8, 417-18, the language of section 1397(k) definitively is *not* the language commonly employed by Congress in saving clauses intended to restrict the scope of preemption. Instead, the language of section 1397(k) is language that refers to and negates compliance with a government standard as an affirmative common law defense.

This narrow language, referring as it does to "[c]ompliance with any Federal motor vehicle safety standard," differs dramatically from the encompassing saving lan-

guage that Congress used both in the Safety Act itself and in numerous other statutes when it intended to restrict the scope of preemption. Thus, for example, in the true express preemption provision of the Safety Act, section 1392(d), Congress explicitly incorporated two saving-clause exceptions to the preemptive first sentence of that provision. Each of the two saving-clause sentences begins with the clear, unambiguous, and traditional anti-preemption saving language, "Nothing in this section shall be construed." The two saving clauses in the preemption provision state:

> *Nothing in this section shall be construed* as preventing any State from enforcing any safety standard which is not identical to a Federal safety [standard]. *Nothing in this section shall be construed* to prevent the Federal Government or the government of any State or political subdivision thereof from establishing a safety requirement applicable to motor vehicles or motor vehicle equipment procured for its own use if such requirement imposes a higher standard of performance than that required to comply with the otherwise applicable Federal standard.

15 U.S.C. § 1392(d) (emphasis added). The saving clauses in virtually every other case decided by this Court in this century have used similar encompassing language, not the narrow, affirmative-defense-oriented "compliance with" language of section 1397(k).[13]

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[13] *See, e.g., John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, —— U.S. ——, 114 S. Ct. 517 (1993) (interpreting saving clause of Employee Retirement Income Security Act, 29 U.S.C. § 1144(b)(2)(A), which states that the statute "shall [not] be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities"); *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 378 (1992) (interpreting saving clause of Federal Aviation Act of 1958, 49 U.S.C. § 1506, which states, "Nothing . . . in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies."); *Cipollone*, 505 U.S. at 518 (referring to saving

Moreover, in *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658 (1993), this Court reaffirmed the established principle that, in interpreting an express preemption provision, "[e]vidence of pre-emptive purpose is sought in the text *and structure* of the statute at issue." 507 U.S. at 664 (emphasis added). Here, section 1397(k) appears five full sections after the true preemption provision—namely, the provision whose title explicitly refers to the "Supremacy of federal standards." That structural fact alone indicates that section 1397(k) was not intended to address preemption. That structural fact is reinforced by the additional structural fact that section 1392(d) contains two, and only two, explicit saving clauses, each of which uses traditional saving-clause language. This additional structural fact suggests that, if Congress had intended section 1397(k) to constitute a third—and the most sweeping—exception to the preemption provision in the first sentence of section 1392(d), Congress would have included the language of section 1397(k) in its logical place, adjacent to the other two explicitly stated saving clauses in the provision labeled "Supremacy of federal standards." Accordingly, the statutory structure of the Safety Act, like its text, shows that section 1397(k) was never intended to address preemption and was never intended to create a sweeping exception to section 1392(d).

Even if section 1397(k) were somehow to be construed as a saving clause that limited preemption, it would not prevent the conflict preemption that exists here. For almost a century, this Court has narrowly interpreted general saving clauses not to prevent conflict preemption, but only to preclude preemption of an entire field; that is, without such a clause,

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clause of Comprehensive Smokeless Tobacco Health Education Act of 1986, 15 U.S.C. § 4406(c), which states, "Nothing in this Act shall relieve any person from liability, under common law or under State statutory law, to any other person.").

> it might have been claimed that Congress having entered the field, the whole subject of liability . . . had been withdrawn from the jurisdiction of state courts, so [the saving clause] was added to make plain that the Act was not intended to deprive the state courts of their general and concurrent jurisdiction.

Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 328 (1981). *See also International Paper Co. v. Ouellette*, 479 U.S. 481, 492-94 (1987); *T.I.M.E. Inc. v. United States*, 359 U.S. 464, 473-74 (1959); *Pennsylvania R.R. v. Puritan Coal Mining Co.*, 237 U.S. 121, 129-30 (1915); *Texas & Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 446-47 (1907).

In *Abilene Cotton*, for example, the Court held that the Interstate Commerce Act precluded a common law action for damages for unjust and discriminatory rates, notwithstanding the Act's broad saving clause, which stated:

> Nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies.

204 U.S. at 446-47. Recognizing the tension between the saving language and the broader purposes of the federal regulatory scheme, the Court held that the saving clause "cannot in reason, be construed as continuing . . . a common law right" inconsistent with the underlying federal aims. *Id.* at 446. *Accord Ouellette*, 479 U.S. at 492-94; *Kalo Brick*, 450 U.S. at 331; *T.I.M.E.*, 359 U.S. at 473-74; *Puritan Coal Mining*, 237 U.S. at 129-30.

Thus, even if section 1397(k) were construed as containing anti-preemption saving language, rather than the affirmative-defense "compliance with" language that it actually contains, it would properly be interpreted to preclude field preemption, not to preclude the narrow form

of preemption that arises when the state standard in issue conflicts with the purposes and policies of the federal regulation or statute in issue.

An interpretation of section 1397(k) that precludes broad field preemption yet permits narrow conflict preemption is consistent with the legislative history of the Safety Act. The Senate Report stated: "[T]he Federal minimum Safety Standards *need not* be interpreted as restricting State common law standards of care. Compliance with such standards would thus *not necessarily* shield any person from product liability at common law." S. Rep. No. 1301, 89th Cong., 2d Sess. (1966), *reprinted in* 1966 U.S.C.C.A.N. 2709, 2720 (emphasis added). If section 1397(k) prevented preemption of common law claims, the words "not necessarily" and "need not" would be not merely superfluous, but internally inconsistent. If, on the other hand, section 1397(k) addresses only compliance with affirmative defenses, or precludes only field preemption and not conflict preemption, the quoted legislative history is sensible, precise, and consistent with decades of Supreme Court precedents. In short, compliance with a federal Safety Standard does not *necessarily* prevent application of a state standard, but it does so in instances in which the state standard would impede the federal purposes.

CONCLUSION

For the foregoing reasons, review by this Court is neither necessary nor appropriate. Respondents respectfully request that the petition be denied.

Respectfully submitted,

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IN THE
Supreme Court of the United States
October Term, 1995

Estate of Diane Montag, by and through Michael Montag,
the Personal Representative of the Estate, and
Michael Montag, individually,
Petitioners,

v.

American Honda Motor Company, Inc.,
Honda Motor Company, Ltd., a Japanese corporation, and
Honda R & D Co., Ltd., a Japanese corporation,
Respondents.

Petition for a Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

Eight months ago in *Tibbetts v. Ford Motor Co.*, Honda argued in an Amicus Brief that this Court should review the preemptive effect of the National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. §§1381, *et seq.* (the Safety Act). Honda now advances a variety of factual and procedural arguments to avoid review of the Tenth Circuit's decision in this case. Honda's true motives are clear. Honda does not want the Court to review this case because Honda was successful at the Tenth Circuit. All of Honda's arguments are meritless.

I. HONDA'S STATEMENT OF THE FACTS ATTEMPTS TO ASSERT THAT MRS. MONTAG'S INJURIES WERE INEVITABLE AND THEREFORE THIS COURT SHOULD NOT REVIEW THE CASE. HONDA'S ASSERTIONS ARE INCORRECT.

This is a case brought by the Estate of Diane Montag for injuries which resulted when she was ejected from her automobile despite the fact that she was wearing her seat belt properly. In its statement of facts, Honda has attempted to portray the automobile-train accident as being of such terrific force and at a specific location on the car so as to imply that Ms. Montag's injuries were inevitable whether or not she was ejected.

The train did not plow directly into the door of the Prelude. The brunt of the force was absorbed by the left rear wheel and rear axle. The car was thrown clear of the train. The driver's portion of the passenger compartment remained essentially intact.

Jury Instruction No. 5 told the members of the jury that if they found that Ms. Montag's injuries were caused by contact between her head and a portion of the train (as contended by Honda), they should complete Verdict Form A or, in the alternative, if they found that Ms. Montag's injuries were caused by being ejected from the vehicle, they should complete Verdict Form B. The jurors completed Verdict Form B.

II. REVERSAL BY THIS COURT OF THE PREEMPTION HOLDING WOULD NOT RESULT IN AN ADVISORY OPINION. FURTHER, THE TRIAL COURT'S EVIDENTIARY RULINGS WERE PROPERLY CHALLENGED IN THE TRIAL COURT AND PRESERVED FOR APPEAL.

Honda has also attempted to evade direct consideration of the preemption issue by raising two procedural issues unsuccessfully advanced at the Tenth Circuit level: that the "independent grounds" for the Court's exclusion of airbag evidence renders the preemption issue moot; and that Montag did not preserve the evidentiary issues by making an offer of proof or otherwise submitting the disputed testimony and exhibits into evidence. Both of these assertions are incorrect.

The trial court entered an initial Scheduling Order on May 28, 1992, which required Honda to file a motion on preemption no later than December 1, 1992, or the defense would "be deemed abandoned." Honda did not file any such motion by that date. On March 1, 1993 (two years prior to the close of discovery) Honda produced various internal documents

and engineering studies related to its efforts to select a passive restraint system to meet the minimum requirements of Federal motor vehicle safety standard 208.

Honda, having allowed the Court's deadline for a motion regarding the preemption issue to have passed, realized after the depositions of their employees that in order to bar that testimony and prevent damaging language contained in their own internal documents from being shown to the jury, Honda would need to feign surprise regarding the airbag issue. In reviewing the entire history of the proceedings in this matter, it is impossible to believe after two years of discovery which included other deposition references to airbag technology and hundreds of pages of Honda documents containing references to and discussion of airbag technology that the Honda Defendants were surprised Plaintiff intended to present to the jury the internal Honda documents that unfavorably compared the cheap and ineffective system which they had installed in the Montag vehicle to a manual belt/airbag system which their engineers clearly preferred.

As a result of Honda's alleged "surprise", Honda filed its Motion in Limine claiming one of the Plaintiff's experts was going to be called to testify regarding the feasibility of airbag technology.

While Honda's Motion in Limine was pending, Montag filed a designation of video tape deposition testimony of Honda's employees to be played for the jury at the time of trial. These designations included testimony regarding airbag technology, and Honda's employees reading aloud from

portions of Honda's internal documents regarding the superiority of a manual seat belt system in combination with an airbag when compared to the door-mounted seat belt system adopted by Honda.

This designation of testimony was received by the trial court before the arguments on Honda's Motion in Limine. Prior to the issuance of the Order in Limine, Honda filed objections based upon their Motion in Limine to the portions of the videotaped depositions that concerned the testimony and Honda documents which referred to airbags.

After entering the Order on Honda's Motion in Limine, the trial court then ruled on Honda's objections to specific testimony and documents. As such, the evidentiary issues based on the trial court's written preemption order were properly before the trial court and were properly preserved for appeal.

The Montag Estate, in its Opening Brief and its Reply Brief at the Tenth Circuit argued the above facts regarding Honda's lack of surprise with regard to the airbag evidence, and presentation and preservation of the evidentiary issues.

In its Opening Brief to the Tenth Circuit, the Montag Estate set forth in detail the trial court's knowledge of the specific evidence which was being barred by the Order in Limine (Opening Brief Plaintiffs/Appellants, pp. 13-15).

After Honda's Tenth Circuit Brief questioned whether or not the evidentiary issues raised by the trial court's

preemption decision were properly preserved, the Montag Response Brief made a detailed recital of the discovery and procedural history of the case and stated:

> A review of the trial transcript should make it fairly clear that the renewal of Montag's objections would have been futile and would have resulted in a "needless provocation of the trial judge" [*United States v. Mejia-Alarcon*, 955 F.2d 982, 986-988 (10th Cir. 1993)].

Despite these issues being extensively discussed, briefed and addressed in oral argument by both Montag and Honda, the Tenth Circuit made no mention of these issues in its opinion.

Assuming that the trial court was correct that Plaintiff had not properly endorsed the airbag issue, the alleged "independent grounds" to exclude airbag evidence would not prevent a re-trial should this Court reverse on the preemption issue.

The late endorsement ground cited by the trial court in support of excluding airbag evidence was solely for the purpose of preventing unfair surprise at trial to the Honda Defendants. If this Court were to reverse the preemption holding of the trial court and remand this matter for re-trial with the airbag evidence reinstated, Honda could not now claim, nearly three years later, any "surprise" based on Montag's intent to use the testimony of Honda's employees and Honda's own internal documents.

A retrial would require a new scheduling order and opportunities to endorse witnesses and experts would arise. The so-called "independent grounds" would no longer be at issue.

The documents and testimony in question were offered into evidence and were excluded by the Court. There was no hint that the ruling was subject to reconsideration. Renewal of Montag's objections to the trial court's Order in Limine regarding the evidence would have been futile and would have resulted in needless provocation of the trial judge and a distraction to the fact finders. As such, Montag was not required to renew objections or offer evidence which had been previously excluded. *See*, *United States v. Mejia-Alarcon*, *supra*; and *Sprynczynatk v. General Motors*, 771 F.2d 1112, 1118-1119 (8th Cir. 1985).

The "independent grounds" on which the trial court's decision was partially based would not survive a reversal by this Court on the preemption issue and, thus, this Court's opinion on the preemption issue would not be an advisory opinion. Further, the necessary evidentiary issues which flowed from the trial court's erroneous preemption opinion have all been properly objected to and preserved. On any new trial, Montag would be entitled to a reversal of the trial court's previous orders. As such, the case before this Court properly presents the preemption question.

III. CERTIORARI SHOULD BE GRANTED AS THERE IS A CLEAR CONFLICT BETWEEN SEVERAL STATE COURTS OF LAST RESORT

AND FEDERAL COURTS OF APPEAL REGARDING THE AIRBAG PREEMPTIVE EFFECT OF THE SAFETY ACT.

Honda attempts to distinguish the holdings of the Eleventh Circuit, in *Doyle v. Volkswagenwerk Aktiengelellchaft*, 81 F.3d 139 (11th Cir. 1996); and *Hernandez-Gomez v. Leonardo*, 917 P.2d 233 (Ariz. 1996), by claiming that those cases are not "no airbag claims". This is true in so far as it goes. However, the issue before the Court is not whether "no airbag claims" are preempted by the Safety Act. The issue is whether the Safety Act preempts common law claims of defective design.

The Eleventh Circuit has recently stated that the Safety Act does not preempt common law claims based on the design of passive restraint systems:

> . . . This circuit has expressly held that the standards promulgated under the National Motor Vehicle Safety Act do *not* preempt common law claims. [citations omitted]

Doyle v. Volkswagenwerk Aktiengelellchaft, *supra*, at 141 (emphasis in the original).

Recently, the Arizona Supreme Court in *Hernandez-Gomez v. Leonardo*, *supra*, stated:

> Any preemptive effect of 15 U.S.C. §1392(d) is limited to those state crashworthiness standards applicable to a

> particular aspect of vehicle or vehicle equipment performance, in terms of forces and accelerations, measured on anthropomorphic dummies in test crashes, when there is a federal standard already applicable to the same aspect of performance. . . . If Volkswagen is found liable in tort under the theory claimed by Plaintiff, there will be no conflict with federal law. It was possible for Volkswagen to both comply with federal law and be found liable in tort under Plaintiff's theory. Therefore, a finding of liability under state law would not interfere with or obstruct Congress' chosen methods of accomplishing the objectives set by the Safety Act.
>
> Accordingly, we find there is neither express nor implied preemption of Plaintiff's claim. . . .

Id. at 248.

Honda did not contend (nor would it be possible for them to contend) that other holdings by state courts of last resort are not in conflict with the Tenth Circuit's ruling in this case. *Tibbetts v. Ford Motor Co.*, 665 A.2d 345 (N.H. 1995), *cert. denied* 116 S. Ct. 773, *rehrg. denied* 116 S. Ct. 1036 (1996); was a no airbag case in which the New Hampshire Supreme Court unanimously found a "no airbag" claim was not preempted by the Safety Act.

Similarly, in *Wilson v. Pleasant*, 660 N.E.2d 327 (Ind. 1995) the Indiana Supreme Court held that "no airbag" claims were not preempted stating:

> We reject, as did the Court of Appeals, GM's argument that Plaintiff's airbag claim is expressly pre-empted by the Safety Act. After a careful study of the United States Supreme Court decisions in *Cipollone* and *Myrick*, we hold that the §1397(k) pre-emption clause entirely forecloses implied pre-emption in this case and permits Plaintiff's airbag claim to go forward. And even if we applied the principles of implied pre-emption analysis as restated in *Myrick*, we conclude that it would be improper to imply pre-emption here.

Id. at 339.

There is a clear conflict between the Tenth Circuit's opinion in this case and holdings of the Eleventh Circuit, and the courts of last resort in the states of Arizona, Indiana, and New Hampshire. This Court should resolve these conflicts now, not wait for further disagreements among the lower courts.

CONCLUSION

For the reasons stated herein and in the original Petition for Certiorari, the Petition should be granted.

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